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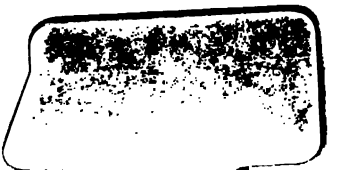

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida.

AT

JANUARY TERM, 1848.

By JAMES T. ARCHER, Reporter.

VOLUME II.

TALLAHASSEE:
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JUDGES

OF THE

SUPREME COURT OF FLORIDA,

DURING THE PERIOD OF THESE REPORTS.

HON. THOMAS DOUGLAS, Chief Justice.

HON. THOMAS BALTZELL,
HON. GEORGE S. HAWKINS,
HON. J. B. LANCASTER,
} Justices.

JAMES T. ARCHER, Attorney General.

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THE DECISIONS

OF THE

SUPREME COURT OF THE STATE OF FLORIDA.

AT

JANUARY TERM, 1848.

THE UNION BANK OF FLORIDA, FOR THE USE OF CHARLES MORRISON, *vs.* BURWELL MCBRIDE.

A writ of Error will be dismissed on motion made for that purpose, where the plaintiff in error was the original plaintiff, and had not, *previous* to suing out his writ of error, paid all costs incurred in the court below, and given bond, as required by statute.

There is no exception to this rule in favor of non-resident plaintiffs.

LANCASTER, JUSTICE:

This cause comes up by Writ of Error, from the Circuit Court for Jefferson county, Chief Justice THOMAS DOUGLAS having sat at the trial.

MCCANTS, for Defendant, moved the court, that this Writ of Error be dismissed.

1st. Because plaintiff in error (who was original plaintiff) had not, at the time of suing out the writ, paid costs. 2nd. Because the plaintiff in error had not given a bond for costs, in such case provided by law.

Hagner, for Plaintiff, stated:

He did not know that costs had been paid, but thought it probable that, pursuant, to a general understanding between the Clerk of the Circuit Court and himself, the costs had been charged to him. Also that a bond for costs in this court has not been given, and that Morrison, the real plaintiff in interest, resides in England, too far away to have been yet heard from, since the trial below.

Union Bank for the use of Charles Morrison, vs. Burwell McBride.

The statute of February 12, 1836, Thompson's Digest, 447, section 5, referred to by defendant's attorney provides that "no "appeal, or Writ of Error, shall hereafter be granted to the original "plaintiff in any suit, unless said plaintiff *first* pay all costs which "may have accrued, in and about said suit, up to the time when "said appeal or Writ of Error is prayed; and, also, enter into bond, "with one or more securities, in a sum sufficient to cover all costs "which may accrue, in the prosecution of said appeal, or Writ of "Error, conditioned to pay the same, if the judgment, sentence, or "decree of the court shall be affirmed."

This act of the Legislature (believed by the court to be in full force) is regarded by them as applicable to and conclusive on this motion. The payment of all costs below, and entering into bond, as in the act prescribed, seem to be steps precedent to granting a Writ of Error, imperatively required by the statute. Any other construction would, they think, be repugnant to the act, an evasion of it, and, in some instances, render it inoperative.

The reason assigned for not having given the required bond does not, in the opinion of the court, strengthen the plaintiff's position. He is admitted to be a non-resident, and, therefore, not within the reach of process from the courts of this State. It is not sufficiently apparent that he paid all costs which accrued in and about his suit in the Circuit Court, the best evidence of which would be the certificate of the Clerk of that court, and in the opinion of this court, therefore, the most proper evidence. He failed in his suit below, yet, without payment of past costs, or security for those which may here accrue, he seeks further to pursue this defendant. His being a non-resident, adds legal force to the liability he was under to pay all costs below, as well as give bond for those which might accrue here before suing out his writ.

The court are unanimously of opinion the motion must be allowed, and do order this cause to be dismissed, and that the defendant, Burwell McBride, have judgment for his costs.

MARGARET BUTLER, ADMINISTRATRIX, &C., *vs.* THOMPSON & HAGNER, TRUSTEES.

WHERE, in an action of debt against two joint defendants the writ is returned *"non est inventus,"* as to one, and a verdict is obtained against the other, but judgment on the verdict is arrested on motion, on account of the insufficiency of the return as to the other; and where the order granting the motion in arrest, after reciting that the parties appeared by counsel, and that the motion was argued, simply concludes, "it seems to the Court that said motion be sustained," the Court may, at a subsequent term, permit the return of the Sheriff to be amended, and the pleadings to be amended, and a trial upon the merits to be had, notwithstanding such order arresting the judgment.

The order sustaining the motion in arrest was not final, but the cause remained in *fieri*, and the plaintiff might very properly have had leave to amend.

Where in such case the plea to the original declaration reached the whole merits of the cause, as well after as before the amendments to the declaration, it is a plea to the amended declaration, and makes an issue between the parties to be submitted to the jury.

Whether an entry by the Clerk, reciting *"this day came the parties by their attorneys,"* is of itself evidence of the appearance of both parties—quære?

This cause was tried in the Leon Circuit Court, before Judge BALTZELL, and comes up on Writ of Error. A full statement of the case is given by the Chief Justice, who delivered the opinion of the Court.

Mr. *Archer,* for Plaintiff in error:

If the judgment of the court upon the motion in arrest was incomplete on the record, amendments at any time would be allowed to complete and perfect it, there being that in the record to amend by. Nevertheless, the order is final, as much so as any other informal entry of judgment. If the order was final, the further proceedings at the next term, being without notice to defendant, are of course void. Hair *vs.* Moody, 9 Alabama, 397. And such proceedings are without notice, unless the entry of the clerk, "this day came the parties," &c., is to conclude the defendant. But this entry is no evidence of defendants appearance. Gwin *vs.* Planter's Bank, 1 Howard, Miss. Rep., 527.

But the amendments in this case should not have been permitted. The object of amendments to informal judgments is, in all cases, to *perfect* them. Here amendments are allowed to *defeat*, to *set aside* the judgment. This is the exclusive province of an appellate tribunal.

Again: there was no issue in May, 1847, to be tried by the jury. The amended declaration (the amendment being in substance) was a new declaration, and the plea to the original was not to be regarded as a plea to the amended declaration, particularly in the absence of the defendant, who, by such construction of the pleadings, was made a party to those subsequent proceedings, when *in fact* he was not a party.

Mr. *Thompson*, for Defendants in error.

DOUGLAS, Chief Justice:

This is an action of debt instituted by the defendants in error in the Leon Circuit Court against Alexander Patterson, Thomas J. Latham and Bradley McKimmy. The writ is in the following words to wit:

"STATE OF FLORIDA.

"TO THE SHERIFF OF LEON COUNTY—GREETING.

"We command you to summon Alexander Patterson, Thomas J. Latham, and Bradley McKimmy, if they are within the County of Leon, personally to be and appear before the Judge of our Circuit Court for said County, in Tallahassee, on the second Monday in November, next, being the first day of our next term, to answer Leslie A. Thompson and Thomas H. Hagner, Trustees, &c., of an action of debt. Debt $10,000, damages $5000, and have you then and there this writ.

Seal of Court

Witness, Daniel McRaeny, Clerk of our said Circuit Court this 31st day of October, A. D. 1845, and 70th year of American Independence.

D. McRAENY, *Clerk*.
By JOHN B. KEEN, *D. C.*"

Which said writ was duly returned by said sheriff endorsed in these words: "Executed by serving a copy hereof on two of the defendants, Latham and McKimmy. Patterson *'non est inventus.'* October 31st, 1845. A. A. FISHER, *Sheriff*.
By J. W. SHERWOOD, *D. S.*"

Margaret Butler, Administratrix, &c. vs. Thompson & Hagner, Trustees.

At the November Term of said court for the year 1845, 70 days were allowed the plaintiffs within which to file their declaration, and by the record, it appears that they filed it on the 10th day of February following, complaining of Bradley McKimmy and Thomas J. Latham defendants, against whom (together with Alexander Patterson, not a resident of said County of Leon,) process has been served, summoned to answer said plaintiffs of a plea that they render unto the plaintiffs the sum of ten thousand dollars lawful money, &c.— The first count declares that a joint and several bond for the sum of two thousand dollars, and the second and only remaining count charges the defendants with the sum of $8000, had and received by them part of the $10,000 demanded. No account for this latter sum is annexed to or filed with the declaration as required by the statute, and it does not seem to have been relied upon in the subsequent proceedings.

To this declaration the defendants, Bradley McKimmy and Thomas J. Latham, put in the plea of *non est factum* upon which issue was joined, and on the 10th day of November, 1846, (the death of Bradley McKimmy, having been previously suggested,) this issue was submitted to a jury, who returned a verdict in the following words, to-wit:

"We the jury find that the bond sued on, is the bond of the defendants." Upon which the following judgment was entered, viz:

"Therefore it is considered by the court, that the plaintiffs recover of said defendant, the debt in the declaration mentioned and their costs. But forasmuch as it appears to the court here, that said bond hath a condition, thereunder written, and the court doth not know what amount of damages said plaintiffs have sustained, therefore let a writ of enquiry issue, returnable at this term."

On the record for the 16th day of the same month of November, the following entry appears, viz:

"This day came the parties, by their attorneys, and thereupon the motion in arrest of judgment upon the jury's verdict in this cause, being argued, it seems to the court that said motion be sustained."

And afterwards, on the same day, the plaintiffs filed their assignment of breaches of the condition of said bond, which breaches are set out at length in the record. Nothing more appears to have been done in the case, until the next term on the 30th day of June, 1847, when the following entry was made upon the record, to wit:

"This day came the same parties, by their Attorneys, and on motion of the said plaintiffs, by their attorneys, it appearing to the court, that the judgment heretofore entered in this case, was arrested by reason of the insufficiency of the return of A. A. Fisher, by J. W. Sherwood, D. S., as to Alexander Patterson, one of the original parties named in the writ returned *'non est inventus,'* and it also appearing to the court, that the first writ or summons was sufficient: It is therefore ordered by the court, on the motion of the plaintiffs' attorneys, that the Sheriff of Leon county, amend his return as to the said Alexander Patterson, and that the said Sheriff make return whether or not the said Alexander Patterson, did or did not reside in the county of Leon at the time of the service of said writ upon the other defendants; and thereupon the said Sheriff did amend his return accordingly, and thereupon the court do allow the said plaintiffs to amend their declaration according to said return, and the same was done accordingly, and thereupon came a jury, to-wit:— Charles Demilly, (and eleven others, naming them) who being elected, tried and sworn the truth to speak upon the issues joined upon their oath do say, 'We the jury find that the bond sued on is the bond of the defendant Thomas J. Latham, and we do assess the damages said plaintiffs have sustained by occasion of the defendants breach of the condition thereof at seven hundred and thirty-three 49-100 dollars." Therefore it is considered by the court that the plaintiffs recover against the defendant $10,000 the debt in the declaration mentioned and their costs by them about their suit in this behalf expended, and the said defendant in mercy, &c. But this judgment is to be discharged by the payment of the damages assessed as aforesaid and the costs."

The plaintiff in error, by her attorney, has assigned the following errors, viz:

First, That the proceedings in this cause, had, after the November term, 1846, are without notice to the defendant Latham, and not binding on him or his representatives.

Second, That the judgment of the court arresting the judgment upon the verdict of the jury, was final and could not be disturbed after the expiration of the term, save by the action of an appellate court.

Third, The court erred in permitting the return of the summons to be amended, and the declaration to be amended.

Fourth, The verdict of the jury, on the 30th of June, 1847, is a nullity, as there were no issues joined between the parties and by them submitted to the country.

Fifth, That the proceedings and judgment appealed from, are otherwise irregular and insufficient.

The 12th section of the Act regulating judicial proceedings Duval's Comp. 92, Thompson's Digest, No. 3, page 327, provides that 'when any original summons has been sued out against two or more defendants, and returned by the sheriff or other officer, served upon one or more of the defendants, and that the other defendants do *not reside* in said district or county, as the case may be, it shall be lawful for the plaintiff at his option to proceed to judgment against those upon whom process has been served, or obtain from the court time to perfect service,' &c.

The plaintiffs in this case seem to have selected the first alternative of this provision, and the amendment of the Sheriff's return, and of the declaration complained of, appear to have been made to meet it.

The counsel for the defendants in error insist that the amendments were made at the same term of the court at which the order arresting judgment was entered, and that the court then directed the record to be amended commencing at the first error. As, however, the record does not show these facts, we do not permit them to influence our action, but proceed to enquire whether they could properly be directed and made at a subsequent term. It is contended in behalf of the plaintiff in error, that the order in relation to the arrest of the judgment is final and conclusive and could not be disturbed after the expiration of the term, save by an appellate court.

We cannot assent to that proposition. The order upon the motion to arrest the judgment is in these words:—'It seems to the court that the said motion be sustained.' It would we think, have been more correctly entered in this form:—"It seems to the court that the said motion should be sustained," or "it is ordered that said motion be sustained." Entered however in either way the effect is the same. It does not import finality or conclusiveness, but is substantially just such an order as our statute on the subject in such a case would seem to require, to be followed by the order to amend, and it may well be doubted, whether the court could, with propriety, have entered one of any other import. In the case of Edwards *vs.*

the Union Bank—Florida Reports, 144, which was cited by the attorney for the plaintiff in error as in point, final judgment was entered upon the motion in arrest. On reference to that case it will be found that it was so entered because the opinion of the court was against the plaintiff in the court below, upon the merits of his case, the court holding that the action (which was trespass,) would not lie against a corporation, and the plaintiff had not by law a right to judgment in his favor. Here the reason on which the opinion of the court was founded, was the insufficiency of the return of the sheriff as to Alexander Patterson, one of the original parties to the writ returned "*non est inventus*" whereas it appears the return, according to the provisions of the statute above cited and the facts of the case, should have been "the said Alex. Patterson does not reside in Leon county," a defect that had nothing to do with the merits of the case. This error of the sheriff was no fault of the plaintiff's, and they should not be permitted to suffer by it, if by the rules of law such a contingency could be avoided. The question is could that be done. The 52 section of the Act (above cited) regulating judicial proceedings, Duval's Comp. 99, Thompson's Digest No. 2, page 351, provides that 'When a judgment is arrested the plaintiff shall not be compelled to bring a new suit, provided, the first writ or summons shall be sufficient, but the court may order new pleadings to commence where the error causing the arrest began.' The first writ or summons we have seen in this case was sufficient. No objection was taken to it. In view of this provision of the statute therefore, it does not appear that the defendant in the court below was (as has been contended,) out of court so soon as the order of the 16th of November, 1846, was made, or that he has been out of court at all. The objection therefore, "that the proceedings in the cause had after the November term, 1846, are without notice to the defendant, Latham, and not binding on him or his representatives," fails. When a party is once brought into court, he is chargeable with whatever is done there in the suit in which he is a party, although he did not in fact appear, and had no actual knowledge on the subject, Deleplaine *vs.* Hitchcock, 6 Hill's N. Y. Reps., 17. After that order was made, the cause remaining *in fieri*, the plaintiff might very properly have had leave to amend. They did it seems, actually amend, immediately after the order was made, but the record does not show that they had leave so to do. The defendant did not move for a final judgment in his favor, and thus the record stood over until the next

term, when it is objected that it was too late to permit these amendments to be made. Upon general principles, however, we see no objection to the amendments. In the case of Malone *vs.* Samuel, 3 Marsh, 350, it was held to be correct to allow the sheriff to amend his return even at a subsequent term, and the amendment, (said the court,) will relate back to the proper return day. In Gay *vs.* Caldwell, Harden 63, a sheriff was permitted to amend his return to a writ of *ad quod damnum,* several years after he went out of office there being the inquest to amend by. So in Hutchins *vs.* Brown, 4 Harr. and McHenry, 498, a sheriff was permitted to amend his return of an attachment *several years* after the term to which the return was made. And in Thatcher *vs.* Miller, 11 Mass. 413, it was held that an officer may be allowed to amend his return, although several years have elapsed. And so of a common recovery. Ibid. Ringold *vs.* Brown, citing 2 Bl. Reps., 747—1065, and 3 Wil. 154. And in Smith *vs.* Daniel, 3 Murph. 128, the court held that the sheriff might be permitted to make or amend, according to the truth of the case, a return upon an execution at any time after the return day, even when important consequences may be produced by such amendment. In Massachusetts a declaration may be permitted to be amended, even after judgment *is arrested* for defect in the original declaration, a new trial being granted. Williams *vs.* Hengham Turnpike Co., 4 Pick., 341. And in Wilson *vs.* Brown, 5 Monr., 35, it was also so held, and the provisions of our statute above cited, would seem to be tantamount to the granting of a new trial in a case where the defect does not reach the substantial merits of the case. Where a plaintiff on leave to amend, struck out a count erroneously supposing he had a better remedy for the cause of action on which it was founded, and took judgment on the remaining counts, he was permitted on a review of the first action to restore that count, having first unsuccessfully attempted his other supposed remedy. Parker *vs.* Parker, 17 Mass. 376. And in Salters *vs.* Bayard, 12 Wendell 228, it was held that though a cause had been two years at issue, and twice noticed for trial, the declaration may be amended by adding a *new count* upon the same cause of action on the plaintiff's paying only the costs of the motion, unless the pleas are withdrawn or a new defence is rendered necessary by the amendment. And in Miller *vs.* Watson, 9 Wendell 506 a declaration was permitted to be amended, by adding a new *count* setting forth a special agreement nine years after

the commencement of the suit and after three trials at the Circuit. With these authorities before us we do not deem it going too far to say that the amendments made in this case were properly permitted at the next term after the order of arrest was entered. Indeed we presume the learned counsel who argued this case for the plaintiff in error would hardly have contended that it was too late to amend if he had conceded that his client was properly in court when they were made.

And we might perhaps have dispensed with the citation of cases to this point, but we have thought proper to refer to a few out of the many that might have been adduced to show how far other courts have gone in relation to such amendments and to these we may have added that of Stewart & Preston *vs.* Bennett decided by this court at the last term, Florida Reports 442; where we held that as a general rule "until judgment is signed or there is a *final judgment,* amendments to the pleadings may be allowed to the parties upon proper and equitable terms, and the declaration may be amended at any time so long as the proceedings remain in paper," citing Stephens on Pl. 97, and 1 Wilson 7 and 149.

But it was further insisted on behalf of the plaintiff in error that there was no plea to the amended declaration and consequently no issue for the jury to try, and that the verdict of the jury on the 30th of June, 1847, is a nullity. The answer however to this is, that the plea of *non est factum* was in, which reached the whole merits of the case as well after the amendment as before. The defendant had the right to plead over to the amended declaration, but if he chose to waive that right and go to trial upon the issue as it stood, he might do so. Had he asked leave to plead anew we presume he would have obtained it. As a general rule where a party is permitted to amend or amends without leave, the other party has a right to plead *de novo.* Crosby *vs.* Hill, 1 Wash. 360. Perry vs. VanCleef 1 Hall 165. But if a defendant when a declaration is amended instead of availing himself of this right goes to trial upon a plea or pleas already in which reach the whole declaration and upon which an issue or issues had been joined, he cannot we apprehend properly assign for error that there was no issue for the jury to try. On amending the declaration in King's Bench after plea pleaded the defendant is at liberty to plead *de novo* if the case requires it, and has two days allowed him for that purpose after amendment made. 1 Tidd's Pr. 3 Amer. from 9 London Ed. 107. And in Common Pleas

he may do so if he has occasion or thinks proper, but he is not obliged to vary his first decision. Ibid, 708.

Where the plaintiff neglected to reply to the statute of limitations, and went to trial upon a *nisi prius* record omitting it, but the defendant had the full benefit of a defence upon the statute at the trial, the court refused to set aside the verdict for the plaintiff for irregularity, but suffered him to amend. Snyder *vs.* Snyder, 4 Cowan, 394. And the same was virtually decided by the Common Pleas, in the late case of Cooke *vs.* Buell, 8 Taunt., 184—where there was process against two, one not served and pleadings and judgments against both, judgment was permitted to be amended at a subsequent term, by striking out the name of the defendant not served.

The case of Hair *vs.* Moody, cited by the attorney for the plaintiff in error, from 9 Alabama Reports, 399, is not, according to our view of this case, in point. There the suit had been dismissed, and there was no question but the defendant was out of court. It was, therefore, undoubtedly irregular to set aside the judgment of *non pros.* at a subsequent term, without notice to the defendant; but even this irregularity was waived in that case, by the subsequent appearance of the defendant. Here, as we have seen, the defendant was never out of court—but, on the contrary, was rightly in court, and chargeable with notice of every step there taken in this case. The question, therefore, to which the case of Gwin *vs.* the Planter's Bank, 1 Howard's Miss. Rep., 527, also cited by the attorney for the plaintiff in error, whether an entry by the Clerk, "This day came the parties by their attorney," &c., would, or would not, be conclusive evidence of the fact of such an appearance does not arise, as, if we are right in the opinion that this defendant was never out of court, that entry on this record was properly made. But it may certainly be very questionable, whether in every case, such an entry would not at least be *prima facie* evidence of the appearance of both parties, unless the contrary is shown by some other part of the record.

In the case of Williams *vs.* Hingham Turnpike Company, before cited, Chief Justice PARKER, in delivering the opinion of the court, said: "It is unpleasant to arrest the course of judicial proceedings, on account of defects which have nothing to do with the real merits of the matter in dispute." And again: "Certainly objections which are apparent in the beginning of a cause, but which are

passed until the expense of a trial has been incurred, ought not to be favored." And we fully accord with that able and enlightened jurist in these sentiments. Such is the case before us.

But we find ourselves more fortunately situated than the learned judge, whose words we have just now quoted; for he was obliged to yield to the objection, but there was no charge in the declaration in that case which would support the verdict. But we think the judgment in this case is sustained by the provisions of our statute, and the general principles of law applicable to it, and it is therefore affirmed.

Per curiam.

ROBERT MITCHELL *vs.* JOSEPH CHAIRES, EXECUTOR, &C.

Where the plaintiff in an action of Assumpsit, filed a replication to one of several pleas of defendant, and, afterwards, by leave, filed an amended replication, to which the defendant demurred, and the court sustained the demurrer; and where, on motion of the *plaintiff*, the judgment on the demurrer was set aside, and the plaintiff permitted to have a trial of the issue made by the *original* replication, as well as of the other issues in the cause. Held:

That the plaintiff cannot now be heard to complain that the demurrer to said amended replication remains undisposed of, or to insist upon any matter in relation to it as error, the judgment upon it having been set aside at his instance to enable him to submit the matters of fact in his case to a jury, and he having pleaded over for that purpose.

If he intended to rely upon this objection, he should have permitted the judgment to stand, and assigned it as error.

And although error should appear upon the record, yet if, in distinct pleadings, a complete bar is shown to the action, the judgment for defendant must be affirmed.

Where there are several issues, requiring proof on the part of the plaintiff to sustain them, and a verdict upon them was rendered for defendant, and there is no bill of exception, to show on what ground it was rendered, the court will presume the verdict to be right, and will sustain the judgment entered upon it.

This case was tried below in the Leon Circuit Court before Judge BALTZELL, and comes up by Writ of Error. A statement of the case will be found in the opinion of the court.

Robert Mitchell, vs. Joseph Chaires, Executor, &c.

Haguer, for Plaintiff in Error.

Long, for Defendant.

DOUGLAS, Chief Justice:

This case was brought up by writ of error from the Leon Circuit Court. It is an action of assumpsit instituted by the plaintiff against the defendant as executor of the last will and testament of Benjamin Chaires, deceased, to recover the amount of two promissory notes; one for the sum of $1998 64 1-4 dated February 8th, 1838, payable on the first day of January, 1839, and the other for a like sum bearing the same date and payable on the first day of January, 1840, both made by one Jesse H. Willis, payable to the order of the said Benjamin Chaires at the Union Bank of Florida, and endorsed by him. The declaration contains a count upon each note, counts for work and labor, goods sold and delivered, and the common money counts.

To this declaration the defendant puts in five pleas:

First, That neither he nor the testator undertook or promised in manner and form, &c.

Second, That said Benjamin Chaires in his life time did not undertake or promise in manner and form, &c.

The *third plea* denies demand upon or notice to the defendant as alleged in the first and second counts of plaintiff's declaration.

The *fourth* sets up the statute of limitations of five years as a bar, &c., *"non actio accrevit."*

The fifth is in the following words to wit: "And for further plea in this behalf the said defendant by leave, &c., says said plaintiff *actio non, &c.,* because he says that after his appointment and qualification as executor of the last will and testament of said testator by advertisement dated the 20th day of October, in the year 1839, which he caused to be published that day, and once a week for the space of four weeks in a newspaper printed in Tallahassee, Leon county, Florida, giving notice to all creditors, legatees and persons entitled to distribution of said estate that their claims and demands would be barred unless exhibited within two years; and said defendant avers that said several claims and demands in said plaintiff's declaration mentioned, or either, or any of them, were not

exhibited to him within said period and this he is ready to verify wherefore he prays judgment," &c.

To the first, second and third pleas, the plaintiff joined issue and to the fourth and fifth replications as follows, to wit:

"And as to the said plea of the said defendant by him fourthly above pleaded the said plaintiff says he ought not to be barred or precluded from having, &c. Because he says that the said several causes of action in the said declaration mentioned, did accrue to the said plaintiff within five years next before the commencement of this suit and this he prays may be enquired of by the country, &c.

"And as to the said plea of the said defendant by him fifthly above pleaded the said plaintiff says that said plaintiff ought not to be barred from having and maintaining his aforesaid action, &c. Because he says that the said several claims and demands in said declaration mentioned were exhibited to him the said defendant within two years from the publication in said plea mentioned, and this he prays may be enquired of by the country."

After the filing of these replications the plaintiff obtained leave to amend his replication to the said fourth plea, and filed an amended replication as follows, viz:

"And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said plea by him fourthly above pleaded wherein he alleges that said several causes of action in plaintiff's declaration mentioned did not accrue to said plaintiff within five years next before the commencement of this suit. Because he says that the said several causes of action in the plaintiff's declaration mentioned accrued to the said plaintiff after the death of defendant's testator, and that after the same so accrued the same were duly presented to the said defendant, executor of the last will and testament of Benjamin Chaires deceased, as demands of said plaintiff against the said estate of the said testator within the period of two years after the grant of the letters testamentary to said defendant, executor as aforesaid, to wit, at the county aforesaid according to the statute in such case made and provided and this he is ready to verify, wherefore he prays judgment if the defendant ought to be admitted or received against the said presentment and demand aforesaid to plead the plea by him fourthly above pleaded in this suit as aforesaid."

To this last replication, the defendant, by his attorneys, demur-

red, and their demurrer was sustained. The following entries in regard to it appear on the record, to wit:

"This day came the parties by their attorneys, and thereupon the matters of law arising upon the defendant's demurrer to the plaintiff's replication to the plea of the said defendant, by him fourthly above pleaded, being argued, it seems to the court that the said replication, and the matters therein contained, are not sufficient in law to maintain the action aforesaid. Therefore, it is considered by the court, that the said demurrer be sustained, and that the plaintiff take nothing by his bill, but for his false clamor be in mercy," &c.

Twelve days after which, the following entry appears: "This day came the parties by their attorneys, and thereupon, on motion of the plaintiff, by his attorneys, the judgment herein entered on the 17th day of June instant is set aside, and thereupon came a jury, to wit: Edward Houston, &c., (naming the other eleven jurors,) who, being elected, tried, and sworn the truth to speak upon the issue joined, and having fully heard the evidence, upon their oath do say: 'We the jury find for the defendant.' Therefore, it is considered by the court, that the plaintiff take nothing by his bill, but for his false clamor be in mercy," &c.

The only point insisted upon as error is, "That the court erred in refusing to sustain the replication of *estoppel* to the bar of limitations of five years."

We are by no means prepared to say, that the court erred in sustaining the demurrer to this replication. But whether it did so or not, is wholly immaterial to this inquiry, for the judgment rendered upon it was set aside on the plaintiff's own motion, and for his benefit.

The plaintiff's counsel alleges that he understood at the time that the order of the court, setting aside the judgment on the demurrer, was intended merely to change that judgment from a final one to a judgment of *"respondeas ouster,"* and so he treated it; for it appears by the record, that he refiled his original replication to the defendant's fourth plea, (after this judgment,) which he had abandoned by putting in his amended replication. The effect of all which seems to be, that the defendant waived his demurrer to the amended replication to the fourth, and that the plaintiff abandoned his amended replication, fell back upon the original one, and that the case was submitted to the jury upon the issues joined upon the

first, second and *third* pleas, and the replication to the *fourth* plea, (as originally filed,) and to the *fifth* plea.

And the plaintiff cannot now be heard to complain that the demurrer to said amended replication remains undisposed of, or to insist upon any matter in relation to it as error, the judgment upon it having been set aside at his instance, to enable him to submit the matters of fact in his case to a jury, and he having pleaded over for that purpose. If he intended to rely upon this objection, he should have permitted the judgment to stand, and assign it as error here. In the case of Davis *vs.* Dickson, 2 Stewart's Reports, 370, it was holden, "that where a plea in abatement to a writ and declaration is overruled on demurrer, the party cannot insist on the same matter in arrest of judgment, if he pleads over." If, after the refusal of a court to reject a plea, the plaintiff reply or join issue on the plea, the refusal to reject the plea cannot be assigned for error 7 Blackford, 355.

There were five distinct issues of fact submitted to the jury in this case—a verdict upon them for the defendant, and a judgment upon that verdict. None of the testimony is before the court, no bill of exceptions is to be found in the record, and it is to be presumed that the plaintiff failed in his proofs. No motion appears to have been made for a new trial—from which it may be fairly inferred that the plaintiff himself was satisfied that his testimony did not sustain his issues.

In the case of the United States *vs.* Carlton, 1 Gallison Reports, 400, the court held that, "although error appear upon the record, yet if in distinct pleadings, a complete bar is shown to the action, the judgment for the defendant must be affirmed." Here no error appears, certainly none of which the plaintiff has any right to complain. The pleas present a complete bar to the action unless met by proof, and there is nothing to show what proofs, if any, were offered.

In the case of Blaney *vs.* Findley, *et al.*, 2 Blackford's Reports, 338, the court said, "There is no bill of exceptions to show us on what grounds the court decided, but as the presumption of law is in favor of the decision, if there were any facts that could have been legally before the court that would authorize their judgment, we are bound to sustain it." The reverse of this here holds good, as there were several distinct issues that required proof on the part of the plaintiff to sustain them, and a verdict was rendered for the defendant

upon them, and there is no bill of exceptions to show us on what grounds it was rendered. We are bound to presume that the verdict is right, and to sustain the judgment entered upon it.

The judgment is, therefore, in all things affirmed.

DAVID GORDON AND WIFE *vs.* JOHN G. CAMP.

The Territorial act of Feb. 12, 1836, entitled *"an act to amend an act regulating the mode of suing out writs of error and prosecuting appeals in the Territory of Florida, passed February* 8, 1832, is not repugnant to the 5th Sec. of the act of Congress approved May 15, 1826, entitled *"an act to amend the several acts for the establishment of a Territorial Government in Florida."*

The act of February 12, 1836, is restraining and prohibitory. What was before a writ of right, is no longer so to original plaintiffs. They are not entitled to a writ of error unless they *first* pay all costs incurred in the court below, and give bond as required by the statute.

Filing money in court to be substituted for the personal security required in the plaintiff's bond under that act, will not meet the requirements of the act.

The powers of an attorney at law do not extend to the execution of a bond for his client.

Motion to dismiss the case for non-payment of costs below, and for want of bond to secure costs to accrue.

Douglas & Hogue, for the motion.

Brockenbrough, Contra.

LANCASTER, Justice.

On motion to dismiss this cause for want of bond for costs.—Brockenbrough showed cause against the motion.

It is admitted that at the time the writ of error in this case was granted, no bond was then given. Since that time the attorney at law of the plaintiff has signed and filed a bond in their name, for costs, and as security on the bond, has deposited with the Clerk, one hundred dollars in money.

Perceiving that the opinion delivered at this term in the case of Morrison *vs.* McBride, had not met the approval of the bar, and being anxious to be right, the court have bestowed much care in an examination of the statutes, on the subject of appeals and writs of error. It was objected that the first section of the act Feb. 12, 1836, Duval's laws, 112, on which the decision in the case of Morrison *vs.* McBride proceeded, was never of force, being repugnant to the 5th Sec. of the act of Congress, entitled "an act to amend the several acts for the establishment of a Territorial Government in Florida." Approved May 15, 1826. By reference to that section it appears to the Court, it was provided "that writs of error and appeals shall lie and may be taken on all final decisions of said Superior Courts where the matter in dispute shall amount to the sum or value of one hundred dollars exclusive of costs, to the Court of Appeals of said Territory, in the cases in that section enumerated, all of which are cases arising under the Constitution and Laws of the United States, in the same manner that appeals are directed to be taken from a District to a Circuit Court of the United States. The 6th Section then provides that in the cases enumerated in the first part of the preceding secion, certain sections of the act of 24th Sep., 1789, entitled "an act to establish Judicial Courts of the United States," and another act to amend and explain the 22d Section of that act shall as far as practicable be observed as the regulations to govern writs of error and appeals in such enumerated cases.

The fifth section of the act of 15th May, 1826, then provides in the last part of it, in *all other cases* writs of error and appeals may be taken from said Superior Courts to the Court of Appeals in such manner as the Legislative Council have directed or shall direct. What other cases? Doubtless all such as do not arise under the Constitution and laws of the United States, and such as the Courts of this State have new jurisdiction of under the Constitution of the State.

The Legislative Council under the authority of the provision of the act of Congress before recited, passed an act regulating appeals and writs of error, dated Feb. 10th, 1832. See Duval's laws 108-9. The seventh of that act provides for the test of writs of error that they shall issue *on demand as matter of right*, and then enacts sundry other regulations concerning them. This act remained in force until the year 1836 when the statute of Feb. 12, was enacted. That provides that no appeal or writ of error shall *hereafter* be

granted to the original plaintiff in any suit unless he shall *first* pay all costs accrued up to the time, &c., and also *enter into bond* with &c., Duval's laws 112. It must be seen that the act of 1832 remained in force four years; what evils if any resulted from it, is not declared in the act of 1836. But so much of it as provided that writs of error should issue on demand as a matter of right, is clearly repealed by the act of 1836, in the case of original plaintiffs praying appeals or writs of error, unless they shall *first* pay all costs, &c., and enter into bond, &c., as therein prescribed. In all cases of which the Circuit Courts of this State now have jurisdiction, the act of 1836 was fully and completely in force at the time of its passage, because the act of Congress before referred to had given power to the Legislative Council to provide by law the manner in which appeals and writs of error might be taken in all such cases.

Let it be remembered that the act of Feb. 12, 1836, in the case of original plaintiffs, provides that all costs in the court below shall *first* be paid, and a bond with one or more securities shall *first* be entered into, before an appeal or writ of error shall be granted to such parties, and that this act succeeded or rather superceded another which provided that writs of error should issue on demand as a matter of right. It will be difficult to imagine a form of words, better calculated to restrain and prohibit the granting the writ, except upon the precedent conditions in that act prescribed.

No statute of any other State (brought to the notice of the court) is so conclusive, or rather exclusive in its terms, and the construction given by the courts to theirs furnishes us no precedent in construing ours. The statute of New York, referred to as among the most restraining, contains no requirement that costs below shall be *first* paid, and bond with security also *first* given, before the writ shall be granted. Their courts had a discretion left them. There was no room for construction. It is said that the act of 1836 is remedial, and should be construed most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. It appears to the court to be restraining and prohibitory. What was before a writ of right, is no longer so for original plaintiff's unless they *first* perform the conditions upon which it may be granted.

The counsel for the plaintiffs in error alleges the bond given and security filed in this case are sufficient to meet the requirements of this act. It will be sufficient on this point to say, the bond was

signed for plaintiffs by their attorney at law—that the powers of an attorney at law, do not extend to such a transaction, and the party plaintiff can execute a valid bond only by himself, or his attorney in fact to whom that power is delegated. Moreover, the bond filed was not given until after the writ was granted, nor is there one or more securities on the bond as required by the act. The bond is therefore defective and insufficient. A majority of the court are of opinion that filing money in court, to be substituted for personal security, will not meet the requirements of the act which is prohibitory and restraining, and only such a bond as it provides for is allowable.

It is not necessary for the Court to attempt to assign the reasons which influenced the Legislature in the passage of this act. It may have been to restrain plaintiffs who fail in their suits below, from further harrassing defendants, except on the terms in the act prescribed; or some other reason may have influenced them. Be this as it may, the act is too plain to be misunderstood. *"Ita lex quod scripta est,"* and the alternative remains with the court to enforce the law, or to annul and repeal it. The power of repeal is Legislative. The power of the court is judicial. If the act is unjust, impolitic, or oppressive, the remedy is with the Legislature.

The motion must be allowed. It is therefore considered and ordered by the court, that this writ of error be dismissed, and the defendant do recover his costs in this court, to be taxed by the clerk, &c.

David C. Wilson, Administrator of James Lunn &c. vs. Richard Hayward.

DAVID C. WILSON, ADMINISTRATOR OF JAMES LUNN *vs.* RICHARD HAYWARD.

The Territorial act entitled, "An act to regulate the foreclosure of mortgages by the Courts of common law of this Territory and for other purposes," approved December 11, 1824, may afford a remedy in favor of the mortgagee, or his assignee, against the *mortgagor*, but not against the *assignee* of the mortgagor, because the statute gives judgment for the debt which cannot be rendered against the assignee of the mortgagor.

The party claiming a judgment of foreclosure under the statute should be the owner of all the demands secured by the mortgage, otherwise he is not entitled to judgment.

Where several notes in the hands of different parties were secured by mortgage, and the holders of a part of the notes had by petition under the statute obtained judgment of foreclosure against the administrator of the mortgagor, whereby he and all persons claiming through his intestate were barred of all right and equity of redemption in the mortgaged premises, and a sale of the premises had been made under the judgment—the holder of any of the remaining notes, secured by the same mortgage cannot afterwards have a foreclosure under the statute of the same mortgage against the same defendant.

Writ of error to Leon Circuit Court.

In Nov. 1845, Richard Hayward filed a petition against David C. Wilson administrator of James Lunn, deceased, under the statute regulating the foreclosure of mortgages approved December 11, 1824, setting forth in substance—that on the 4th June, 1840, Lunn executed a mortgage to Robert K. West, of a certain lot in Tallahassee, to secure the payment of $5000 due from Lunn to West on five several promissory notes, bearing date with the mortgage, of $1000 each, payable respectively in one, two, three, four, and five years from the date. That on the 6th May, 1841, West endorsed and delivered to Hayward the note last due and also assigned and transferred the mortgage by written agreement endorsed thereon. That Lunn died intestate and on the 15th October, 1841, administration of his estate was committed to Wilson the plaintiff in error. The petition concludes with a prayer for judgment for the amount of the mortgage debt due to Hayward, and for a foreclosure of the mortgage.

To this petition Wilson filed several objections by way of plea

under the statute alleging that the mortgage had already been foreclosed under the same statute, by judgment and decree against him as the administrator of Lunn rendered in the Leon Circuit Court, at the fall term 1843, in favor of Wilson & Herr merchants of Baltimore, who had become the holders of three of the notes secured by the mortgage, being the three first due. That a sale without objection, under the judgment and decree had been made by the marshal according to law, that Hayward had notice of the sale, and that said Wilson & Herr became the purchasers of the mortgaged premises. Upon these facts, Wilson insisted that another judgment of foreclosure, ought not to be given against him, and also that the claims of Wilson & Herr, to satisfy which the premises had been sold, had priority over the claim of Hayward.

To these objections the petitioner demurred, and the court (Douglas, Chief Justice presiding,) sustained the demurrer, and gave judgment for the petition on the 12th November, 1847, for the amount of the note assigned to him with interest, to be levied of the mortgaged premises, and if that was insufficient then to be levied of assets of James Lunn, *quando acciderint*, &c.; and also entered decree of foreclosure of the equity of redemption in usual form.

To reverse this judgment and decree under the statute, Wilson the administrator of Lunn prosecutes his writ of error in this court.

Douglas & Hogue, for Plaintiff in Error.

Thompson, for Defendant in Error.

BALTZELL, Justice:

The case before us arises upon an application of the holder of one of five notes secured by mortgage, to obtain a foreclosure and sale of the mortgaged property. The defendant insists that another party, holder of three notes secured by the same mortgage due before that of the petitioner, and to whom the mortgage was assigned, obtained at prior term of the court judgment of foreclosure in legal form against the defendant, the representative of the mortgagor. That a sale was had under the judgment, and Wilson & Herr the plaintiffs in the judgment and execution became the purchasers. It appears by the mortgage that there is also a fifth note outstanding, and embraced in the same mortgage. The plaintiff objects to the defence as insuffi-

cient to prevent his recovery, and the Court agreeing with him gave judgment of foreclosure. The propriety of this decision is now presented to this Court. The statute for the foreclosure of mortgages by the Courts of Common Law, under which this proceeding was had, has created no little embarrassment in the decision of cases based upon it.

It may answer where there is merely a mortgage between mortgagor and mortgagee, or between the assignee of a mortgage, having a transfer of the entire debt, and the mortgagor. We incline to the opinion that it will not answer where there is an assignment by the mortgagor against his assignee, because the statute gives judgment for the amount of the principal and interest with costs, &c.

In many cases beyond this there may be difficulty, owing to the peculiar character of the instrument—its complexity and the various conflicting interests to be settled, adjusted and arranged. Mortgages are the creatures almost entirely of the Courts of Equity, in opposition to the sterner rules of the Common Law, asserting an absolute transfer of the title on the failure by the mortgagor to pay the debt. The Courts of Equity moderated this rigor and harshness and in a decree obtained their almost entire regulation and control by framing rules and principles adjusted to their nature and character.

In imposing upon the common law Courts the duty hitherto discharged in equity, it was clearly not the design to revive common law rules and principles in reference to this subject—this would be to destroy them. So far from it, equitable rights are maintained by requiring the person holding the equity of redemption, whether he be mortgagor or any one else to be served with notice, and by the permission to him to file objections, and contest the foreclosure.—Still the Legislature provide but imperfect means of executing their purpose, and give few directions as to the mode of action. We are then left to the rules in equity; or we have none to direct us. These we are constrained to adopt, approved as they are by the experience of ages and founded on the highest wisdom and propriety. So far then as the statute furnishes proper directions, we look to it as the guide, but beyond this the rules of Courts of equity applicable to this subject must govern. We find a difficulty of this kind in the case before us. There has been already a foreclosure and sale of the property mortgaged to pay a portion of the debt embraced in the mortgage. The same tribunal is asked for a second order for sale of

the same property to pay another portion of the same debt against the same defendant, while in all probability an application will be made by the holder of the last note for a third judgment and a third sale of the same property. There being then separate interests, there will be necessarily three claimants of property under three judicial sales. Suits and conflicts between the owners of the various judgments if they purchased, and if others purchased between innocent parties, will ensue, and no one will know what he is buying and each one will dread a controversy as to the title. Such a state of things, so well calculated to do injustice and injury and impair confidence in the action of the Courts is to be avoided, if possible. It could not occur in a Court of Equity under the mode of proceeding prevailing there. Thus in the case of Palmer *vs.* the Earle of Carlisle, on an application by the owner of *one sixth part* of the money due on a mortgage, by bill to foreclosure a *sixth part* of the mortgage estate, the Vice Chancellor held "there can be no foreclosure or redemption unless the parties entitled to the mortgage money are before the Court." Palmer *vs.* Earle of Carlisle, 1 Simons and Stu., 423. 1 Brown, Ch. 368. Story's Eq. Pl., 201. 1 Daniel's Prac. 260, and this we consider as the settled rule of that Court.

Finley *vs.* Bank of U. S. was an application by a mortgagor to set aside a sale had under a decree at the instance of a party holding a subsequent mortgage. The Court say "it cannot be doubted that Coleman ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the Court, no decree ought to have been pronounced in the case, until he was introduced into it." We do not think the decree erroneous because the prior mortgagee was not made a defendant, that fact not having appeared to the Court until the decree was completely executed.—11 Wheaton, 304—6 Cond., 321.

The first section of the law of mortgages itself contemplates the plaintiff to be owner of the entire interest, in saying that the "assignees, &c., may take the same remedies which any mortgagee can take for the foreclosure of any mortgage and *for the recovery of the money secured thereby.*"

The necessity of all parties in interest being before the Court is apparent, for reasons manifest in this very case. Justice cannot, in our opinion, be done without it. If new parties are to be made, the proceeding at law is unsuitable, there being no provision adequate to the object. The true and only remedy is in a Court of

Equity—which accommodates itself to every variety of interest—where the purchaser under the previous sale, who is now a party directly in interest, and which may yet be maintained as far as equity demands, the plaintiff under the first foreclosure and the holder of the last note may all be made parties. The conflicting rights and interests being adjusted and determined, the property may then be sold, with a fair prospect of finding a purchaser, and of the rightful holders of the mortgaged security getting paid to the extent of their interest.

In considering the present case, we have been struck with the difficulty of giving a valid judgment against the present defendant, owing to his position in the matter. By the first judgment, if entered as prescribed by the statute, he was forever barred and foreclosed, and all persons under him, from all right and equity of redemption of or in the said mortgaged property, and every part thereof, the purchaser getting his right, as well as that of the plaintiff in execution, and being substituted to the place of both. If right in this view, the defendant had no further interest, but the proper course was to go against the purchaser, as the proper party to the petition, according to the terms of the statute itself. The prayer is, "that the mortgagor, and all persons claiming, or to claim, by, through, or under him be foreclosed;" and by the 4th section, "personal service of notice, &c., shall be served upon the mortgagor, or *other person* having the equity of redemption." Duval, p. 40.

It has been insisted that this plaintiff has, through the assignment of the mortgage, the superior legal right. But the party having the prior judgment of foreclosure has, by intendment of law, an assignment also, for without it he could not properly have obtained judgment. The counsel for defendant has contested the position, that a parol assignment will carry the interest in the mortgage.—It is sufficient in the present case to decide, without considering this point, that the party claiming a judgment of foreclosure at law should be the owner of all the notes which the mortgage was given to secure, and without it is not entitled to judgment.

The judgment of the Court below will, therefore, be reversed and set aside, and the cause remanded, with instructions to dismiss the petition, without prejudice to the right of the party to file a bill in Chancery, as herein directed, so as to protect the interests of the various parties under the mortgage and the decree of foreclosure already had, as far as possible.

James Lanier and Benjamin C. West, Appellants, vs. D. McCabe, Appellee.

JAMES LANIER AND BENJAMIN C. WEST, APPELLANTS, *vs.* DANIEL McCABE, APPELLEE.

Where a note is given in the name of a firm by one of the partners for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and consent to the transaction.

In such case it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm.

Where several persons formed an association, for the purpose of establishing and putting in operation a steam saw mill, one of the parties cannot issue notes in the name of the company, which shall bind the other members of the company, except the authority be given by their articles of association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual, otherwise a copartner will not be liable for the act of his partner, unless he gave express authority.

Where a note is made by one stockholder of such association as treasurer or agent of the company, payable to another stockholder, and the latter endorses it over to his creditor in payment of an individual debt, it is in effect the making of a note by two of the members of the company, but does not vary the rule which requires that a note so given should, to bind the other members, be given with the express authority of the other members. And where the plaintiff relies upon a subsequent acknowledgment of liability by defendant such acknowledgment must be explicit and express.

APPEAL from Gadsden Circuit Court.

Daniel McCabe, in 1844, filed his bill in Equity in the late Gadsden Superior Court, against James Lanier, Thomas Hodgson, and Benjamin C. West, alleging that James Lanier, in 1844, became indebted to complainant, and being unable to otherwise extinguish his debt to complainant, transferred in payment a note dated 31st March, 1841, payable on 1st January, 1842, to defendant Lanier for the sum of $258, with interest from date, and signed by C. Harris, who describes himself as treasurer of the Quincy Steam Saw Mill Company. That at the date of said note defendants Lanier, Hodgson, and West, together with Cervantes Harris (since deceased,) who signed the note, were members of and constituted, so far as complainant was informed, the "Quincy Steam Saw Mill Company." That the note was executed in good faith by Harris as agent of the company, and upon valuable consideration passing

James Lanier and Benjamin C. West, Appellants, vs. D. McCabe, Appellee.

from Lanier to *the said company*. That complainant had often demanded of the members of the company payment of the note, but that the same remains unpaid. The bill prays that defendants discover the names of the persons composing the company at the date of the note; whether Harris was not the agent of the company authorized to execute notes and contracts for the company; whether he was not in the habit of executing such notes with the knowledge of the company; whether similar notes or contracts had not been adopted by the company, and whether they ever repudiated his authority of public notice, and if so when; whether said Harris left the service of the company of his own accord, or whether he was dismissed for exceeding his authority by executing this or similar obligations; and if so, whether such acts constituted the only ground of dismissal; and whether it was so announced to said Harris or the public; and if to the public in what manner, and at what time. The bill also prays that the amount of the note and interest be decreed to constitute a debt against the Quincy Steam Saw Mill Company, and in default of payment thereof by the company, that it be decreed to constitute a joint and several debt against defendants as copartners, and concludes with a prayer for general relief, and for subpœnas, &c.

In November, 1844, West filed his answer, under oath, admitting that he is and was on 31 March, 1841, a member of the Quincy Steam Saw Mill Company, and that defendants Lanier and Hodgson, and Cervantes Harris (deceased,) were also members of said company. The answer states that he knows nothing of the consideration that passed from Lanier to the company for the note. That Cervantes Harris was employed by the company to stay at the saw mill and sell lumber and other articles, and to receive the money for the same, and to keep an account of the receipts and disbursements of the mill, but denies that Harris had authority to issue notes binding on the company. He denies having any knowledge that such was the practice of Harris until after the notes were signed and issued by Harris, and states that he immediately advised Harris that he was transcending his authority, to which Harris assented, and that he believes no other notes were afterwards issued.

West further states in his answer, that no public notice was given by the company relative to said notes, as the notes were all made to James Lanier, one of the partners, and not transferable by delivery or endorsement. That he never, to the best of his knowledge and belief, recognized any of the notes so issued; that Harris was not

dismissed on account of issuing the notes, as the notes were then in hands of Lanier, and considered as certificates merely that he had advanced such sums to the company.

He further states that prior to 1st January, 1841, he had advanced for the company in cash, $2177 10-100th, which exceeded the advances made by any other member. That Harris died insolvent; that defendant Hodgson is also dead and that he died insolvent and greatly indebted to the company. That Lanier is insolvent and that he (West,) is the only responsible party.

He also states that since the 1st January, 1841, he has advanced $3215 62-100th in payment of debts and expenses of the company, and that there are outstanding demands against the company to a large amount say $3000. He states that James Lanier, his co-defendant, is still interested in the recovery of the note, and has procured complainant to file the bill, well knowing that himself (Lanier) was greatly in arrears to defendant.

He insists that complainant is entitled to no greater relief than Lanier would be, and offers to account with Lanier and every other member of the company.

In November, 1845, Lanier filed his answer under oath, which states that in 1839, an incorporated company was formed, for the purpose of establishing and putting into operation a Steam Saw Mill, in the county of Gadsden. The stock was limited to $5000, and divided into shares of $50 each. That divers citizens of Gadsden together with respondent became owners, and formed the company whis has ever since been called the Quincy Steam saw mill company. That Hodgson, Harris, West and respondent were members of the company, on the 31 March, 1841, and for a long time afterwards; that at this period the company becoming embarrassed and some dissatisfaction existing among the members, it was determined to settle up the affairs of the company. That to that end Harris was authorized by the company, to collect the demands in favor of the company, to pay the debts, to audit and allow the claims against the company, and to give notes in behalf of the company for debts due by the company. That said Harris then became the active partner in the concern, and had the exclusive management of its affairs. That Harris in the settlement of the business, executed many notes similar to that held by complainant, and which so far as respondent knows and believes were always regarded by the members of the company as binding upon them. That respondent held large demands

against the company (for the services of his wagon and teams, for hire of slaves, for money advanced and for goods sold,) beyond his share of the capital stock, which by agreement were submitted to Harris for allowance. That on 31 March, 1841, said company was found indebted to respondent about $4000, and that Harris executed and delivered to him sundry notes in liquidation of that sum, of which the note held by complainant is one. That a few months after the date of said note, and before the same was due, respondent transferred to complainant the note in question for valuable consideration. That Harris was authorized to sign the notes for the company, and no attempt to repudiate his authority, was made until after payments began to be demanded and suits to be instituted. That Harris was recognized as the active partner of the concern long after the notes were given, and until he voluntarily gave up the business. That no notice by the company, or any member thereof, was given to the public, repudiating the notes signed by Harris.

The death of the other defendant *Hodgson,* is not suggested by complainant but is stated in the answer of defendant West.

At the fall term, 1845, the complainant filed a general replication to the answers of West and Lanier, and at the November term, 1847, the cause was tried upon the bill and answers, before DOUGLAS, Chief Justice, who pronounced the following decree:

"This cause came on to be heard upon the bill and answers, and was fully argued by counsel, whereupon it is ordered, adjudged and decreed that the complainant do recover of the defendants the sum of three hundred and ninety-two dollars for principal and interest of the demand sued on; and it is further ordered, adjudged and decreed that the complainant do recover of the defendants his costs in this behalf expended and that he have execution for the same."

To reverse this decree the defendants now prosecute their appeal before this Court.

Carmack, for Appellants.

Dupont, for Appellee, contended:

I. That Cervantes Harris, who signed the note on behalf of the company, had authority to do so.

1st. Harris had the authority as an agent, *impliedly* and by *ratification.* It is a doctrine so fully recognized as to require the citation of no authority to support it, that whatever legal act a man does

by another binds him as firmly as if performed by himself. It is also an admitted doctrine, that an *implied* authority in the agent is as binding upon the principal as if *expressed;* and that this *implication* may be gathered either from the relation of the parties, or from subsequent *ratification,* or even tacit *acquiescence* in the acts of the agent. Now, if we apply these principles to the case under consideration, it will be perceived that the authority of Harris as 'agent,' to sign the note sued upon, is amply established. It is true, that West, one of the defendants, denies that any express authority was ever given to Harris to sign notes on behalf of the company; it is true also, that the same defendant in his answer, *pretends* to deny that the act of the agent was known to the company, but the pretended denial is couched in such equivocal and contradictory terms as to amount to a full admission of the knowledge of the fact. The answer of this defendant does not fully negative the allegation in the bill—the allegation is, that the fact of signing by Harris, was known to the company—the answer is, that it was not known to this individual partner, and is a tacit admission of the allegation as it is set forth, and if this knowledge is brought home to any one member of the firm, and not *repudiated,* it will bind the company. But again, the answer even as to his individual and personal knowledge is so *equivocal* and contradictory, as to amount to a full admission of the allegation, for he only denies having any knowledge that such was the practice of said Harris, *until* after said notes were signed and issued by said Harris." Now it is very evident that he could have had no knowledge of the existence of the fact *before* it had actually occurred, and the tacit admission that he knew it *after* it had occurred, and that he did not repudiate it, is a full admission of the allegation in the bill. The law upon this branch of the case is well established—it is laid down in the books as a salutary rule in relation to agencies, "That when the principal has been informed of what has been done, he must dissent and *give notice* in a reasonable time, or his assent will be presumed." Hammond's Prin. and Agent, 232. 12 John. Rep., 300, Cairnes and Lord *vs.* Bleecker. 2 Kent, Comm. 615-16. 1 John Cases, 110. Paley on Agency, 74. 2 Term Rep. 189 and notes.

But if the facts of the case do not establish an authority to sign the note as an agent on behalf of the company, then we assume.

2d. That his authority to bind the company was ample as a *copartner.* The fact that Harris was a copartner at the time that he

executed the note, is fully admitted by the answers of both West and Lanier. The law upon this subject is well established, "that one partner has an implied authority to bind the firm by contracts relating to the partnership, whether such contracts be evidenced by bare agreements, oral or written, or by negotiable securities as bills of exchange and promissory note." Collier on Partnership, 212.—Ibid 220.

If it be objected that the note given by Harris did not "relate to the partnership;" then we contend that this is admitted in the answer of West, who says that "the note was considered as a mere *certificate* that said Lanier had advanced the sum therein mentioned," and consequently is not obnoxious to the anticipated objection.—Again, if it is objected upon this branch of the case, that McCabe, the assignee of the note, or alleged "certificate," is bound by the *notice* which Lanier, the assignor, must have possessed relative to the character and consideration of the note, then we invoke the principle of equity, that "where one of two innocent persons is to suffer that party shall suffer who by his own act and conduct has enabled the other to be imposed upon." Story on Agency, p. 56, Sec. 56. Paley on Agency, p. 201. 2 Barn. and Ald. p. 143, Baring *vs.* Corrie.

And consequently if it was the understanding of the company that a security which had been signed upon their behalf, purporting to be and possessing all the essential qualities of a "promissory note," should stand only in the character of a "mere certificate," it was their duty to have given public notice of this understanding; and upon failing to do so, the loss, if any, must be borne by the company, and McCabe be viewed in the light of an innocent holder *without notice,* and entitled to all the privileges of the same. But again, the limitation of the general authority of a partner, that the securities made by him on behalf of the firm, must relate to "transactions growing out of the partnership business," is to be taken with this qualification, 'that the holder of the paper has taken it with full knowledge that it *does not* relate to the business of the firm,' otherwise the firm will be responsible whether the security so taken relate to the partnership or not. 14 Wend. Reps. 133-140. 15 Wend. Reps. 364-66, Catskill Bank *vs.* Stall.

This doctrine results from the *implied authority* growing out of the relation of the parties as copartners.

II. The second objection made in the Court below to a recovery

upon this note against the company was that "it is the individual note of Cervantes Harris."

In reply we allege, that the law establishes no particular mode of signing, and if it be apparent that the note is signed with the *intention* of binding the firm, it is sufficient. For examples of signing Vide Collier on Partnership 228 and 228, (a.)

III. The third objection taken at the hearing was "that the paper sued upon is not a valid *'promissory note,'* not containing any words of negotiability."

In reply we state the law to be that "it is not essential to the validity of a bill or note as an instrument, that it should contain any words of negotiability." Vide Chitty on Bills, 180.

IV. The fourth objection was, "that the assignee of the note took it from Lanier, the assignor, subject to all the 'equities' existing at the date of the assignment between Lanier and his copartners of the Quincy Steam Saw Mill Company." These "equities" are alleged to be the obligation of Lanier as a copartner to contribute to the settlement of the partnership debts. Now we contend that according to the *proofs* in the case, there are no partnership debts to be settled, and in order to determine this point it will be necessary to look into the *pleadings and proofs,* as presented by the Record. It will be remarked by the Court that there was a *general replication* filed to the separate answers of Lanier and West, which put the cause completely at issue, under the 66th rule, dispensing with a "rejoinder," or subpœna to rejoin, required by the English practice, and that without further *proofs* than what are furnished by the allegations and admissions contained in the bill and answers, respectively, the cause was brought to a hearing and argued accordingly. To the bill and answers *alone* therefore must we look for the proofs.

It is true that West, one of the defendants below, set forth in his answer, a large indebtedness due by the company; but this matter is alleged as a *substantive* matter of defence, or by way of *avoidance,* and is not *responsive* to any allegation contained in the bill, and in order to have made it available to him as a defence, it ought to have been supported by positive or *independent testimony.* This has not been done, and therefore so much of his answer as relates to the alleged indebtedness, must be rejected in the consideration of the case, *as not amounting to any evidence.* Vide Story's Eq. Sec. 1528-9. 2 John. Ch. Rep., 88-90, and note (a.) 7 Vesey, 587. 1 Wash. Rep., 224, Beckwith *vs.* Butler. 1 Munford

Rep., 373, Paynes *vs.* Coles. 2 Caines Cases in Error 66, Bush *vs.* Livingston, et al. 1 John. Rep., 580, Greene *vs.* Hart.

V. The fifth objection made in the court below to a recovery in this suit was, "that the complainant had his remedy in a court of law."

The English doctrine upon the point is too well understood by the court, to require any citation of authority to sustain it, to-wit: "that the assignee of a bond or other security not containing any words of negotiability, cannot sustain an action upon it *in his own name in a court of law* but has the *alternative* of either suing in a court of law, *in the name of the assignor,* or original obligee, or of resorting to a court of equity;" and in accordance with this doctrine have been the decisions in the State Courts. Vide 11 Ohio Reports 21, Townsend *vs.* Carpenter.

Such was the law in this state until the passage of the Judiciary act of 1828; the 34th section of which was evidently intended to operate only as a cumulative or *enlarging* statute, and not to *restrain* or otherwise limit or deprive the courts of equity of their original jurisdiction in matters of this kind. Upon the construction of statutes, Blackstone lays down the doctrine by way of illustration, that "if by a former law an offence be indictable at the quarter sessions and a later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either, unless the new statute subjoins express *negative* words, as that the offence shall be indictable at the assizes, and not elsewhere." Vide 1 Black. Com. p. 90, (marginal.)

A case in point is found in our statute book, where a special statute gives to a mortgagee the right to foreclose his mortgage in the courts of common law, and yet it has never been contended or even conceived by any one, that the ordinary or original jurisdiction of the courts of equity in cases of *"foreclosure,"* is in the slightest degree *restrained* or *limited* by the operation of this statute.

The case of 'Williams *vs.* Judge' lately decided in the Supreme Court of the U. S. was cited in the court below, to support the point above relied upon; but it is a sufficient answer to that authority to remind the court that, that case *only* decides, that under the 34th section of the statute above referred to, a bond made by an individual and others, payable to himself, *may* be sued upon in the name of the assignee, *in a court of law;* but does not in the remotest manner

intimate the opinion that a suit in chancery might not also be maintained.

VI. A sixth objection was made by the appellant in the court below; to wit: "that the answer of Lanier (which fully admits all the material allegations of the bill) was no evidence against his co-defendants."

It is admitted as a *general rule* of evidence in courts of equity "that the answer of one defendant cannot be read against his co-defendant;" but to this general rule there are exceptions, and one of the exceptions is when the co-defendant is also a copartner.—Vide Gresley's Eq. Ev., 25; citing 1 Taunt. 104, Good *vs.* Braddick. 1 Russ. and Mylne, 191; Prichard *vs.* Draper. 8 Mod. 180, Hilliard *vs.* Phaley.

This point of objection is here referred to, not so much for the purpose of invoking the aid of Lanier's answer, as to set forth the doctrine with its proper limitations.

BALTZELL, Justice, delivered the following:

This is a suit in chancery to recover upon a note purporting to be executed by Cervantes Harris as Treasurer of the Quincy Steam Saw Mill Company. The authority of Harris being denied an effort is made to sustain it by the position that he was also a member of the company and as such had a right to execute notes in the name of the firm—and secondly, that West the party charged as another member of the firm acquiesced in the notes executed, and neither repudiated nor rejected them. Conceding that Harris signed the note as a member of the firm the question arises as to its obligation upon the other members and particularly upon West, regarded now as the only responsible party. If the company had been indebted to McCabe, for articles purchased of him which were necessary for the concern and in their usual line of business we presume there would be no difficulty. But McCabe had no claim against the company. His claim was against Lanier for a debt unconnected with the company and he took this note by the statement in the bill "believing Lanier to be in failing circumstances and unable to make any better arrangement for the payment of the debt." It is too well settled to be now disputed that "where a note is given in the name of the firm by one of the partners for the private debt of such partner and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and

consent to the transaction." 16 John., 38. 2 Caines, 246. 2 John., 300. 4 Ibid., 251. 1 Wend., 531. Chitty on Bills, 47.

In such case it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm: *prima facie* the transaction is fraudulent on the part of both debtor and creditor Bailey on Bills, 57. Green *vs.* Weakin, 2 Stark. 307. Williams *vs.* Walbridge, 3 Wend., 415.

We have considered the case most favorably to McCabe by treating this as a partnership concern having the right to issue bills, but are satisfied that no such authority exists as to this company except it be given by their articles of association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual; for otherwise a copartner will not be liable for the acts of his partner unless he gave express authority. Therefore a director or shareholder in a mining or gas light company, or a partner in a farm, is not liable like a partner in trade for every bill issued without his authority. Chitty on Bills 39-46. Dickinson *vs.* Valpy, 10 B. & C. 128. 5 M. & R., 126. 4 John. 267.

Nor do we consider that there was a subsequent approbation, acknowledgment, or admission as made out in the bill and answer to fix the liability of West. There must be an acknowledgement to the plaintiff or some prior holder of the bill and it must be explicit and express. Chitty 46. So far we have treated the note as signed by Harris, without reference to the endorsement by Lanier. This does not in our opinion alter the case. There was a signing by one stockholder and an endorsement by another of a note passed by the latter for his individual use. This is in effect but the making of a note by two of the members of the company in a form different from an ordinary note signed by two, but does not vary the rule which requires that a note so given should be with the consent of those sought to be charged and if not it imposes no obligation upon them. Instances have been cited of a recovery upon bills and notes issued by a firm and passed by an individual member in good faith for his own use. This may well be where a company indebted, by the consent of all the members give a note or bill. Sometimes a recovery has been had on a bill or note of this kind fraudulently put in circulation but being in the hands of a *bona fide* holder. But there is nothing of the kind here either by proof or the admission of the parties, indeed the very contrary appears. McCabe however as

assignee of Lanier stands in his place to the extent of the note with the company if anything shall be due to him on a settlement of their affairs and if he thinks proper his bill may be continued for an account and settlement with that view. If this however be unnecessary by the state of their affairs and is declined, then the bill of complaint should be dismissed.

It is therefore decreed and ordered that the decree of the Circuit Court be and the same is hereby reversed and set aside as to West and the cause remanded to that court with directions to allow the complainant, if he chooses, to have an account and settlement of the affairs of that Steam Saw Mill Company or to amend his bill to allege express ratification by West and for other proceedings consistent with equity, and if not, that his bill be dismissed with costs as to West.

HOPKINS AND MOODY *vs.* ARTHUR BURNEY.

The common law did not give damages in replevin to a defendant, and the Stat. 7, Hen. 8, ch. 4, and 21 Hen. 8, ch. 19, only gave damages to avowants or other persons making connusance or justifying as bailiffs in replevin for rent or service, and have not been extended to defendants claiming property.

Under the plea of *"non cepit"* in replevin evidence of damage on the part of the defendant is not admissable in any case.

This plea admits the property of the thing taken to be in the plaintiff, and if the defendant means to dispute the question of property he must plead specially.

The property being by this plea admitted to belong to the plaintiff, it results as a matter of course, in the absence of all proof to the contrary, that the taking and carrying away of the property was *wrongful.*

The defendant cannot have a judgment of *retor no habendo* on a verdict in his favor upon an issue joined on a plea of *non cepit.*

Where the jury were sworn to try the *issue joined* and there was in fact no issue, and judgment upon the verdict was entered, the statute of jeofail does not cure the error and the judgment must be reversed.

Error to Duval Circuit Court, where this cause was tried before Judge MACRAE.

Hopkins and Moody, vs. Arthur Burney.

Fraser, for Plaintiff in Error.

Burritt, for Defendant in Error.

DOUGLAS, Chief Justice, delivered the folowing:

This is an action of replevin instituted in the Circuit Court of Duval county by Benjamin Hopkins and Solomon Moody against Arthur Burney to recover a certain negro slave named Charles. The declaration contains but a single count to which a plea of *"non cepit modo et forma"* was put in, but was on the same day on which it was filed withdrawn by leave of the court for reasons stated in the record, which however are not material to the decision of this case. On the 17th day of November, 1847, the plaintiffs by their counsel moved the court for a continuance of the cause, and filed an affidavit in support of their motion, which was after argument had thereon overruled, and on the next day, a jury was empanelled and sworn "well and truly to try the issue joined between the parties," who found for the defendant and assessed his damages at one hundred and twenty dollars for the detention of the said negro Charles from the 25th day of November, 1846, until the 18th day of November, 1847, and further that the defendant was entitled to a return of the said negro Charles, upon which verdict judgment was entered for the sum so found, with interest thereon until paid, and that said plaintiffs return to said defendant the said negro Charles, and that a writ of restitution be awarded, and that said plaintiffs pay to said defendant the costs of these proceedings taxed at twenty-one dollars thirty-two cents.

The following bills of exceptions are on file, which by agreement of the parties are to be taken and considered as a part of the record in this case, viz: "on the trial of the above entitled cause to prove the *issue joined* in the same, the plaintiff produced William Hickman as a witness, who being duly sworn, testified as follows, to-wit: That he knew the parties, knew the negro Charles in controversy in this suit. That he was deputy sheriff and served the replevin issued in this suit; that he found the negro Charles aforesaid at Arthur Burney's potatoe patch digging potatoes; that Burney then claimed said negro as his; that the potatoe patch where he found the negro was near said Burney's house; that he has known said negro four or five years, perhaps more; when he first knew him, he was in possession of James Piles' family; does not know whether he was

owned by James Piles, or his wife. He was owned by some of Piles' family."

The plaintiffs here rested their case, and the defendant offered to prove the damage of the detention of said slave to him under the said replevin. To this the plaintiffs objected, but the court overruled the objection, and the counsel for the plaintiffs excepted and prayed the court to seal this bill of exceptions, which was done accordingly.

The counsel for the plaintiffs then requested the court to charge the jury, that under the pleading and evidence in this cause the plaintiffs are entitled to recover. This the court refused to do, and on the contrary charged the jury, that it was incumbent on the plaintiffs to show by evidence affirmatively, that the property belonged to them, or that they had such right of possession as could not be lawfully divested by the defendant, they must prove that the slave was wrongfully taken. The court directed the jury that they find for the defendant in the absence of the proof required, and assess his damages for the detention of the property by the plaintiffs. To which charge of the court, and every part thereof, the plaintiffs' counsel excepted, and prayed the court to seal this bill of exceptions, which was done accordingly.

Whereupon the plaintiffs sued out their writ of error to the said Circuit Court, and have herein assigned the following error, to wit:

First. The court erred under the plea of *non cepit* in admitting evidence of damage on the part of the defendant.

Second. The court erred in refusing to charge the jury that under the pleadings and evidence in this cause, the plaintiffs are entitled to recover.

Third. The court erred in charging the jury that it was incumbent on the plaintiffs to show by evidence affirmatively, that the property belonging to them, or that they had such right of possession as could not be lawfully divested by the defendant.

Fourth. The court erred in charging the jury that the plaintiffs must prove that the slave was wrongfully taken.

Fifth. The court erred in charging the jury that they find for the defendant, in the absence of the proof required, and assess his damages for the detention of the property by the plaintiffs.

Sixth. The court erred in rendering a judgment for a return upon a verdict found upon an issue joined upon a plea of *non cepit.*

That the court erred as charged in the first error assigned there

can be no doubt. The common law did not give damages in replevin to a defendant, but they were allowed to certain defendants in that action by the statutes of 7 Hen. 8, ch. 4, and 21 Hen. 8, ch. 19. But these statutes only gave damgaes to avowants, or other persons making conusance, or justifying as bailiffs in replevin for rent or services. Brittenton *vs.* Turker, 1 Brad. & Bing. 517. And they have not been extended to defendants claiming property, 2 Bac. Abr., Tit. costs (F) 53 Turner *vs.* Gallillie, Hard. 153. Hopewell *vs.* Price, 2 Harris & Gill, 276—277. Nor to defendants who deny the taking.

The plea of *non cepit* controverts all the material allegations in the declaration except that which affirms that the goods are the property of the plaintiff. It disputes the plaintiff's right to recover damages, whilst it admits his right to have the chattel. Ruckey, *et al. vs.* Handy, 2 Mills R., 446. And it would seem absurd to deny (as does the plea of *non cepit*) the taking, renounce all claim to the property and yet to ask damages for the detention. In the case of Phillips *vs.* Harris, 3 J. J. Marsh, 121, which was an action of replevin, and a plea of property interposed by the defendant on which issue was joined, the court said that a judgment for the plaintiff in replevin, is for damages and costs, and a judgment for the defendant is for a restoration of the property and costs. This last remark was of course applied to the issue on the plea of property. And see 5 Dane's Abr. of American law, 515, Sec. 2, where the same principle is recognized.

The second error assigned is that "the court erred in refusing to charge the jury, that under the pleadings and evidence in this cause plaintiffs are entitled to recover." The instructions asked embraced matter of fact as well as of law. It is often very difficult to separate the one from the other, and as there is some diversity of views amongst the members of this court, as to the propriety of the refusal of the court below to give this instruction to the jury, and a decision of the question is not necessary to our determination of the cause and its importance has been very much diminished by an act passed at the last session of our General Assembly, prohibiting the Judges of the Circuit Courts from charging juries upon the facts in any case, we forbear expressing any opinion upon it.

The third error is deemed to be well assigned. Under the plea of *non cepit* it was not incumbent on the plaintiffs to prove that the slave Charles belonged to them, and the court should have so charged

the jury. The plea admits that fact, and puts in issue only the taking (as alleged in the declaration,) and the detention. McKinley *vs.* McGregor, 3 Wharton 69, 369. Ruckey and others *vs.* Handy 2 Mills Rep., 449. Golusha *vs.* Butterfield, *et al.*, 2 Scammon Rep., 227. Seymour *vs.* Billings, 12 Wendell, 286. 1 Stark. Ev. 715. 2 Leigh's *Nisi Prius*, 1330. Bemus *vs.* Beekman, 3 Wendell, 667. Williams *vs.* Welsh, 5 Wendell, 290. In this last case the plea *cepit in alio loco*, was put in by the defendant, and the court below decided that the plaintiff must make out his case in the same manner as he would have been required to do, had the plea *non cepit* been interposed. The plaintiff proved the taking at the place charged in the declaration. The case was carried up, and the Supreme Court of New York held that this ruling was right. Chief Justice Savage in delivering the opinion of that court, said, "this plea does not admit the taking as the plaintiff has laid it; it traverses the *place* and in this action the *place* is material. The plea denies the taking at the *place*, but if the plea of *non cepit* alone be put in and it appear that the defendant had the goods in his *custody* in the place alleged in the declaration, the plaintiff will be entitled to a verdict on this plea." Leigh's *Nisi Prius*, 1330. Walter *vs.* Kersop, 2 Wilson 354, 355. But if the defendant proves the taking in another place, the plaintiff will (according to the rule laid down in 1 Strange, 507) be non suited. As however, our tenth general rule of practice page 12, pamphlet; rule 13 page 5 annexed to acts of the General Assembly of 1845, provides that the plaintiff shall in no case be compelled to submit to a non suit, the rule here would be different. The plaintiff would have a right to submit the proof to a jury but would not on such proof be entitled to a verdict. The plea of *non cepit*, admits the property of the thing taken to be in the plaintiffs in the action, and if the defendant means to dispute the question of property, he must plead it specially. He will not be allowed to dispute the ownership under an issue which only denies the taking. 2 Phil. Ev. 126. 1 Chitty's Pl., 159. Bemus vs. Beekman, 3 Wendell Rep., 673.

The fourth error is also well assigned. The slave in controversy (being admitted by the plea of *non cepit*, to be the property of the plaintiffs, it results as a matter of course, in the absence of all proof to the contrary,) that the taking and carrying away of said slave was wrongful. The taking and carrying away of a personal chattel of another person, to his damages is (*prima facie* at least) a tres-

pass. 1 Saund. on Pl. and Gv., 84, N. 2, 3. Toller on Executrs, 112. Cro. Jac., 362. 2 Bouvier's L. Dict. Title Trespass, 579.

And proof that the property was in possession of the defendant at the place charged in the declaration, is evidence of such taking.—Walton *vs.* Kersop, 2 Wilson, 354, 355. Croke Eliz., 869. 1 Saund. on Pl. and Gv., 347, N. 1. Bull N. P., 54. 7 Leigh's *Nisi Prius*, 1330. Amos *vs.* Sennate, 4 Scamm., 445. (In this last case it was held that a plea of *non cepit* in replevin for a wrongful detention presents an immaterial issue.)

The case of Moore and Moore *vs.* E. Moore, administrator of N. Moore, 4 Missouri Rep., 421, is also in point.

Under the plea of *non cepit* in replevin, the court will not permit the defendant to give evidence of special matter in justification.—McFarland *vs.* Baker, 1 Mass. Rep., 153. - Leigh's *Nisi Prius*, 1330. Dane's Abr. of Amer. Law, 530, sec. 5. 1 Saund. on Pl. and Gv., 387.

The fifth error assigned is a mere corrollary from the third and fourth, and they being well taken is consequently sustained.

The sixth. That the court erred in rendering judgment for the return upon a verdict found on an issue joined upon a plea of *non cepit* is well sustained by authority. This plea in replevin is said to be like a general issue in other actions. It may be so in some respects; but, if found for the defendant, if the jury say he did not take the goods, how can there be a judgment *"pro retorno habendo."* *Non cepit* is a plea in bar not involving the merits of the action, and if a defendant claims a return of the goods, he must add an avowry or cognizance inducing a return. *Per* Savage, Chief Justice, in the people at the relation of P. Tower *vs.* Niagara, C. P., 4 Wendell's Rep. 217. 1 Chitty's Pl., 490, 537. 1 Saund. on Pl. and Gv., 374, N. 1. 1 Strange, 507. Wilkinson on Replevin, 50. 6 Law Lib., 18.—The defendant cannot have a judgment of *retorno habendo* on a verdict in his favor upon an issue joined on a plea of *non cepit*, Hill *vs.* Stocking, 6 Hill's N. Y. Rep., 288. 2 Leigh's *Nisi Prius*, 1330. Seymour *vs.* Billings, 12 Wendell, 286. Carpenter *vs.* Stevens, Ibid. 589. Smith *vs.* Snyder, 15 Wendell, 671. McPherson *vs.* Melherich, 20 Wendell, 671. Prasser *vs.* Woodward, 21 Wendell, 205.

Hitherto we have considered this case as though the plea of *non cepit* was in, and issue regularly joined upon it, because from this state of the record it appears that the parties and the court at the

trial below acted under that impression, and because the counsel for plaintiffs in error insisted at the argument of the cause that it ought to be so considered. But that plea was withdrawn upon the same day in which it was filed and now constitutes no part of the pleadings in the case. It remains therefore to enquire what effect this should have upon our judgment.

The plea of *non cepit* having been withdrawn and no other plea put in, there was no issue for the jury to try, and where it does not appear that there was no issue presented to the jury a judgment on their verdict will be reversed. Oliver vs. Judge, 2 Stewart's Rep., 483. If the jury are empanelled to try the issue joined when in reality there is no issue joined, the judgment must be reversed and the verdict set aside. Wilkinson *vs.* Bennett, 3 Munf. Rep., 314. The want of a plea in replevin is not cured by a verdict. Lucky *vs.* McDermot, 5 Serg. and Rawle Reps. 331.

But it was suggested on behalf of the defendant in error that perhaps the statute of jeofails cures that defect. This question was directly presented in the case of Snyder *vs.* Burke and wife, 4 Rand. 161, and the court there held that the act of jeofail will not sustain a verdict and judgment in a case in which the record states that the jury were sworn to try the *issue* joined but does not show that any plea was filed by the defendant upon which issue could be joined, and Lucky *vs.* McDermot above cited is also an authority in point. This question however was fully considered at the last term of this court in the case of Miller and Croom, *vs.* F. Hoc, and it was then held that where the jury were sworn (as in this case) to try the *issue joined* and there was in fact *no issue*, the statute of jeofail did not cure the error, and judgment must be reversed. Florida Reports, 195. And upon mature reflection we see no reason to doubt the correctness of that opinion.

It would seem from the case of Wilkinson *vs.* Bennett, 3 Munf. 314, before referred to, that in Virginia a verdict in such a case will not cure the error under the statute of jeofails, although it may be against the party who failed to meet by a negative on his side, affirmative matter pleaded on the other side.

It was insisted upon the argument of this cause by the counsel for the defendant in error, that the affidavit above mentioned, filed by the plaintiffs in support of their motion for a continuance, show that the property in the slave Charles is not in the plaintiffs in error in their individual capacity and that if they have any interest in or

right to him, it is not personally but as trustees, and that therefore they cannot under any circumstances recover in this suit. Upon this subject it is sufficient to observe that this affidavit is not before the court; it is no part of the record and ought not to have been put into it. There is nothing to show that it was offered in evidence to the jury but if it had been thus offered, still it would constitute no part of the record unless brought into it by a bill of exceptions.

Upon a full review of this case we are constrained to reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion.

Per totam curiam.

CHARLES BROWARD AND WILLIAM EUBANKS *vs.* MARIA DOGGETT, EXECUTRIX OF JOHN L. DOGGETT.

In an action of assumpsit where no damages are stated in the declaration, the defect is cured by verdict and judgment, especially when sufficient damages are stated in the writ.

Where, in an action by the executrix to recover for professional services rendered by her testator, as general attorney of an estate of which defendants were the r resentatives, after the testimony of several witnesses had been received, going to establish that plaintiff's testator had for several years acted at the instance of defendants as attorney of the estate, and placing estimates upon these services—it was testified by a witness for defendants, that the plaintiff had admitted that her testator was employed to collect money due to the estate represented by defendants on a considerable number of notes which were placed in his hands, and that one of the defendants agreed to give him ten per cent. on all moneys collected. Held, that it should have been left to the jury to determine whether such agreement did not embrace all the notes which plaintiff's testator had in his possession belonging to the estate, whether collected through means of suit or otherwise.

Where in such case the defendants gave in evidence two notes of the plaintiff's testator, given for negro hire, payable to defendants as executors of the estate for which the professional services were rendered, and there was a receipt endorsed on each of the notes, one of the receipts being in the hand writing of plaintiff's testator, the receipts created a presumption of payment on account of the professional services of the plaintiff's testator, rendered for the benefit of the estate of which the defendants are the representatives.

Charles Broward and Wm. Eubanks, vs. Maria Doggett, Executrix, &c.

The presumption is, that a debtor will pay his debt through an indebtedness of his creditor in preference to making a payment in cash.

Error to Duval Circuit Court.

This was an action of assumpsit by defendant in error, to recover of plaintiffs in error, for professional services alleged to have been rendered to them by John L. Doggett (the plaintiff's testator,) as an attorney at law. The declaration contained a count for work and labor,and two special counts (*indebitatus* and *quantum meruit*) for professional services by the said John L. Doggett, "in prosecuting and defending divers causes, suits, and business for the defendants, executors of Stephen J. Eubanks, deceased, and for fees due, and of right payable to the said John L. Doggett, in respect thereof; and also for other work and labor, care, diligence and attendance of the said John L. Doggett in his lifetime, in and about the drawing, copying and engrossing of divers conveyances, deeds and writings for the said defendants at their special instance and request. And also for divers journeys and other attendances by the said John L. Doggett in his lifetime, before then made, performed and given in and about the said business and other business of the said defendants, and at their special instance and request.' The amount of damages laid in the declaration, was left in blank.

The defendants appeared and pleaded separately.

The defendant, Charles Broward, pleaded *non assumpsit,* and two special pleas. Issue was joined on the plea of *non assumpsit* and demurrers were filed to the special pleas. The demurrers were sustained, but as no error was assigned by the defendants on that account a further notice of these pleas is unnecessary. The defendant Eubanks also pleaded *non assumpsit* and issue was joined thereon.

The cause was tried at the November Term, 1847, Judge Macrae presiding.

On the trial the plaintiff in the court below introduced Isaiah D. Hart as a witness, who testified, "That Judge Doggett was, as he supposed, general attorney for the defendants as executors of Stephen J. Eubanks, deceased. That he supposed so from the fact of having seen Mr. Broward and Judge Doggett frequently together in the clerk's office, attending to the business of the estate. Knows of no other attorney employed by defendants. Doggett was Judge of the County Court, and defendants frequently had business with

Doggett at his office and at the Clerk's office. Broward was the active executor. Knows of Doggett being generally employed by defendants. Saw them frequently doing business in the Probate and Clerk's office. Does not recollect to have seen Mr. Eubanks the defendant, with Judge Doggett. Broward was the active executor, and seemed to attend to all the business. Saw Doggett frequently with him transacting the business of the estate, and saw him attending to defendants business in court, and knew that they had no other attorney. Would conclude that they employed him as their attorney for the same reasons that I would conclude that they employed Mr. Fraser."

William Hickman, a witness for plaintiff, also testified and said that "he had frequently heard defendants speak of Doggett doing business for them. Of Doggett bringing suits for them. Eubanks died in 1837, he believes. Knows the defendants, and knew Doggett well."

Henry D. Holland testified that 'he hired some negroes of the estate. In dispute about the hire, Charles Broward referred witness to Judge Doggett as their lawyer. Doggett died in February 1844.'

Robert Robinson, also testified that he had hired some negroes from the defendants as executors of Eubanks. That there arose a controversy about the wages and defendants referred witness to Judge Doggett. This was in 1841.

Wm. F. Crabtree also testified as a witness and said that 'he had a claim against the estate of Eubanks and called on the executors to pay it—they said they had no money but referred witness to Doggett as their attorney and collector who might have made collections and would in that event pay him—this was seven or eight years ago. Witness also says he is Judge of Probates of Duval county and that from his knowledge of the estate and its amount and its transactions he should think these services worth $500 per annum in the same. Does not know precisely what service Doggett rendered. Heard defendants say Doggett was their general attorney. Doggett served about four years and until his death."

Plaintiffs then read in evidence a receipt of defendants to plaintiff given under a schedule of notes or claims. Receipt as follows:—

[Schedule.] "Received, Jacksonville, February 22, 1844, from the hands of Maria Doggett, executrix of the estate of John L. Doggett

deceased, the above papers and notes, which were given in the hands of John L. Doggett attorney at law for collection, with the exception of those marked not found.

WM. EUBANKS,
CHAS. BROWARD, } *Executors.*

James W. Bryant, another witness, testified that Doggett conducted the business of defendants in court, and was their general attorney; that he had a knowledge of the estate, and from his knowledge of the estate and its business in court and elsewhere, including advice, &c., thinks Doggett's services worth at least three hundred dollars per annum; indeed, thinks his services, exclusive of matters in court, were worth that sum; thinks Mr. Burritt would have charged $600; but Doggett's services were worth less, regarding his business and professional capacities. The witness having examined the papers in five different cases in Duval Circuit Court, in which Doggett was attorney for the executors of Eubanks, said that the fees for prosecuting four of these cases to judgment should be $20 each, and for the other case pending when Doggett died $10.

It was then proved that the letters testamentary granted to defendants were dated 13th April, 1847.

Philip Fraser, a witness for defendants, was then sworn, and testified—that, as attorney of defendants, he had several interviews with the plaintiff in relation to the claim which she, as executrix of John L. Doggett, preferred against the defendants, as executors of Stephen J. Eubanks, deceased, for services alleged to have been rendered to them as attorney in the business of Eubanks' estate. That in those interviews she told the witness that Judge Doggett was employed to collect money due the estate on a considerable number of notes which were deposited in Judge Doggett's hands, and that said Broward agreed to give Doggett ten per cent. on all moneys collected, for his services—the plaintiff claimed four or five hundred dollars as her due. She claimed a sum sufficient to balance the judgments of defendants against her, and said that Judge Doggett had a great deal of trouble with the business of Eubanks' estate—that he had been the executors' attorney in all their business, and she thought enough was due him for his services to balance the said judgment—that witness, as defendants' attorney, offered to compromise by paying her one hundred and thirty-five dollars. Witness also stated that there were but four or five cases prosecuted to judg-

ment in favor of defendants by said Doggett, as their attorney—that witness had been the attorney of defendants since Doggett's death, and was familiar with business of the estate of Eubanks—that he would have done all that was done by Doggett in the business of the estate, so far as he had been able to discover from the papers and business in court, for one hundred and fifty dollars, and thinks that a high compensation.

James McRory sworn as a witness for defendants says. He knows the parties, has known Broward eight years. In January 1840 was at the hiring of slaves of Eubank's estate. Judge Doggett cried the hiring. Witness was clerk of the executors from January 1841, to the time of the division of the estate. Doggett was not the general attorney of the executors employed to manage the affairs of the whole estate. The executors consulted him also as Judge of the County Court relative to their duty. When he performed any extra services such as hiring the negroes, he was paid for it at the time. Broward was forward in transacting the business of the estate, and Eubanks concurred in his acts and undertakings as joint executor and witness considered that they acted jointly in the executorship.

Witness was Clerk generally. Doggett approved bonds as Judge of Probate. The executors were generally together when with Doggett, and held the estate indifferently between them. No other counsel was employed by them than Doggett up to the time of the latter's death. Knows of no advice given by Doggett as Judge of the County Court except as to the bonds for hires. Witness was perfectly conversant with the business of the estate, and if Judge Doggett had been employed or retained generally *in all business* of the estate, would have known it.

The defendants also offered in evidence two promissory notes made by Doggett jointly and severally, with Charles Merrick as his security payable to the executors of the estate of Stephen J. Eubanks, the first for the sum of $225, dated 1st January, 1840, and payable 1st January, 1841, and the other for $145, dated 4th January, 1841, and payable 1st January, 1842.

On the back of the first note was endorsement as follows:

"Received January 4th, 1841, ten dollars on account of the within note. CHARLES BROWARD, Executor."

On the other note was endorsement as follows:

"Received on the within note seventy dollars.

April 2, 1842. CHARLES BROWARD, Executor."

It was proved that the body of the last mentioned endorsement was in the handwriting of John L. Doggett. It was also admitted that the notes were given for negro hire by Doggett as principal and Merrick as security. Also that these notes had been sued and prosecuted to judgment against the Executrix of Doggett; that execution had been issued and property sold, but that said judgment was still unsatisfied as to a considerable balance.

It was further admitted that the account for professional services now sued on had been filed as a set off in the suit on these notes, but owing to the pleadings was not availed of but was in some way withdrawn and that counsel waived all objections on that account.

The testimony was here closed and the counsel for defendants asked the court to instruct the jury "that, as there was a special contract between John L. Doggett and the defendants respecting the subject matter of this suit, the plaintiff cannot resort to an implied one"—which instruction the court refused and in substance charged the jury "that to the mind of the court the evidence does not show an express contract, and that no express contract is proved except as to the rate of compensation to Doggett for collections, viz: ten per cent."

The defendants counsel then asked the court to instruct the jury "that the endorsement upon the last named note in the handwriting of Doggett is evidence of an account stated between the said Doggett and defendants at the date thereof." Which instruction the court refused and in substance charged the jury "that the said notes and the said endorsements were not of themselves evidence of a settlement or account stated between the parties thereto as to all matters of account between them, but that the jury might consider them in connection with the other testimony, if any there was, tending to show that there had been such a settlement or account stated as that contended for. That it was most probable, so far as the court was capable of judging of the evidence, that these notes were given and were to be accounted for, separately, with a view to a more precise and careful administration of the estate, and to disconnect them from private individual transactions of the Executors with Doggett. That the jury need not consider the same, in making up their verdict, in any other point of view."

The defendants excepted to the opinions of the court. The jury returned a verdict for the plaintiff for $500 10-100 and judgment was entered thereon on the 22d Nov., 1847.

To reverse this judgment the defendants prosecute their writ of error in this Court and assign for errors that no damages are laid in the declaration and that the Court erred in refusing the instructions prayed and in giving the instructions given.

Fraser, for Plaintiff in Error.

I.—1st. No damages are laid in the declaration. The Court erred in entering up judgment on a verdict rendered upon so defective a declaration.

Where two declarations were sent up to the Supreme Court, in one of which a blank was left for damages, and it did not appear upon the record that leave had been granted to file a second declaration, it was held that the Court might presume that the cause was tried on the perfect declaration, and that leave had been given to file the second. 1 Wharton's Dig., 613, 614. Pedan *vs.* Hopkins, 13 Serg. & R., 45.

2d. "In actions sounding merely in damages, it is an established rule that the plaintiff can recover no more than the amount laid in the declaration." 1 Wharton's Dig., 588. Gratz *vs.* Phillips, 5 Binney, 564. Ferry *vs.* Stone, 2 Dall. 184. S. C., 1 Yeates, 186. H. Blackstone's Rep., 643. Kennell's Forms, 11—(n. 1)—viz:

"A sum sufficient to cover the plaintiff's demand, with interest (if recoverable) to the time when it is likely that final judgment may be obtained, should be here inserted, as he cannot recover grater damages in assumpsit than those laid in the declaration, and if judgment be entered for more, it is error." Chearly *vs.* Morris, 2 Blac. Rep. 1300.

"Though where the jury give greater damages, the objection may be got rid of, by entering a *"remittitur"* of the surplus *before judgment,* or the plaintiff may amend his declaration, and have a new trial, if the amount of the excess should render it advisable." 2d Tidd 896, 806, 652-'3.

3d. "The jury cannot give more damages than are laid in the *end* of the declaration." 1 Chitty's Pleading, 372. Fitz. Abr. tit. Damages, 7-13-16. Yelv., 45-70. Cro. Jac. 297. 1 Bulst., 49.

II.—1st. It is a rule that where there is an express contract, the plaintiff cannot resort to an implied one. 1 Chitty's Pleading, 372. 2 B. & P., 118. 3 Esp. Rep., 213. 1 N. R. 273. 2 Marsh,

273. And if there were no privity between the parties, independently of the special contract, the common counts would be of no avail. 3 Maule & Sel., 173. 3 Camp., 101. Chitty on Bills, 7th Ed., 364. 2 Phillips Ev. 108-9. Livingsdale *vs.* Livingston, 10 John. R., 37. Raymond, *et al. vs.* Bernard, 12 John. R., 274. Witt & Green *vs.* Ogden, 13 John R., 56. Jennings *vs.* Campbell, Id., 94. 2d Starkie Ev., 78, 1 N. R., 104.

III.—1st. "A promissory note given to the plaintiff by the defendant is evidence of an account stated." 2d Starkie's Ev. 75.

2nd. "A promissory note is *prima facie* evidence of money lent by the payee to the maker, or of a balance due from the maker to the payee upon an account stated." 2d Starkie's Ev., 182. Storey *vs.* Atkins, 2 Str., 719. B. N. P., 136-7. Harris *vs.* Huntback, 1 Burr., 373.

3d. A receipt upon a bill is *prima facie* evidence of payment by the acceptor. 2d Starkie's Ev., 184. Peake's C., 26. Peake's L. E., 221. 2 Camp, 439.

Long & Walker, for Defendant in Error:

BALTZELL, Justice:

The Court below erred, we think, in the instructions given to the jury in this case. According to the admission of plaintiff, her testator was employed to collect money due the estate *"on a considerable number of notes,"* which were deposited in his hands. Broward, one of the defendants, agreed to give the testator Doggett "ten per cent. on all money collected." Now, it is obvious that this agreement extended as well to the notes deposited as to the compensation, yet the Court instructed the jury "that there was no express contract proved, except as to the rate of compensation to Doggett for collections, to wit, ten per cent." It should, in our opinion, have been left to the jury, whether this agreement for ten per cent. did not embrace all the notes which Doggett had in his possession belonging to the estate, whether collected through means of suit or otherwise."

The second instruction is as to the effect of the notes and receipts. In reference to these, the Court say, "they were not of themselves evidence of a settlement or account stated between them, but the jury might consider them in connection with other testimony tending to show that there had been such settlement or account: that it was

most probable, so far as the court was capable of judging of the evidence, that these notes were given to be accounted for separately, with a view to a more precise and careful administration of the estate, and to distinguish it from the private and individual transactions of the executors with Doggett, and that the jury need not consider it in any other point of view.

The effect of this would seem to be to destroy the weight of both the notes and the receipts. Now, we know no grounds upon which such a course may be justified. They were both in evidence and a part of defendants' case, who were entitled to the benefit of them as far as they tended to prove a fact, or conduce in any degree to thir defence. It has been insisted here, that the notes were evidence of an account stated. Without enquiring into the correctness of this position in general, it is sufficient to say, that by the admission of the parties, they were given for the hire of negroes by Doggett, so that presumption as to the cause of their execution may not be indulged. The receipts present greater difficulty. They are evidence of an acknowledgement of payment of the sums specified, and have probably had this effect already in the case in which judgment has been rendered against the estate of Doggett. Whether a jury could infer that the receipts were evidence of payments on account of those services rendered by Doggett to the estate, for which payment is now claimed by his executrix, is of more diffcult solution. The presumption is, that a debtor will pay his debt, through an indebtedness of his creditor, in preference to making a payment in cash. This is the usual and ordinary course of business, and we, therefore, incline to the opinion, that defendants were entitled to the benefit of this presumption, however slight, leaving it to be rebutted or explained by other testimony. In denying this weight to the receipt and notes, and in excluding them from the jury, as was virtually done by the instruction given, we think also the court erred.

We do not think the objection to the want of damages at the conclusion of the declaration is available, after verdict and judgment, especially, where there is sufficient in the writ, as in this case, to cure the defect.

The judgment will be reversed, and the verdict set aside, and the cause remanded for further proceedings, not inconsistent with this opinion.

DARIUS WILLIAMS AND JOHN A. CRAIG, *vs.* JOHN C. MCGEHEE, ADMINISTRATOR OF JOHN MILLER.

The tendency of the present age is to allow objections to be taken rather to the credibility than to the competency of a witness, and competency is always presumed until the contrary is established.

Where a witness had verbally assumed the payment of the expenses of a suit for the benefit of the plaintiff, so as to create a mere honorary or moral obligation on his part to comply, he is not rendered incompetent to testify as a witness for the plaintiff.

Where money has been overpaid by an agent, or paid by mistake, he is a competent witness for his principal in an action to recover it back.

No man can, by the voluntary payment of the debt of another, make himself that man's creditor, and recover from him the amount of the debt so paid.

ERROR to the Jefferson Circuit Court.

This case was tried at the Circuit before Judge BALTZELL.—The facts of the case are fully set forth in the opinion of the court, delivered by the Chief Justice.

McCants, for Plaintiff in Error.

1. The whole record is before the court. 6 Har. & Johns. 81.

2. Wm. C. Miller was incompetent from his interest in the event of this cause. He was interested, because he had engaged to pay the cost, and the plaintiff had refused to conduct the suit; because the plaintiff's success would gain him a credit on reimbursement—the plaintiff's failure would cause him to loose the one or the other.—Stewart *vs.* Kip., 5 J. R., 256. 5 Hill's N. Y. R., 202. Greenleaf's Ev., 458. Story on Agency, 364-'5-'6-'7. Paley on Agency, 108. Starkie on Ev., 1731—note. 3 Hill, N. Y. R., 580. 1 Phillips, 61-'3. 2 Ib., 110-'17.

3. The judgment below was the consequence of William C. Miller's testimony, because no other testimony sustains the plaintiff's action for money paid by witness to defendants for John and Elizabeth Miller.

4. If we admit the testimony of William C. Miller, it proves that the witness' own money, not the plaintiff's, was paid to defendants, and in a sum different from the accounts of John and Elizabeth

Miller. But plaintiff must show that it was his money that was paid. Archbold's N. P., 186.

5. Wm. C. Miller's testimony, if admitted, was overbalanced by the testimony of Pettus, the entry of Rouquie, the pass book, the conduct of John Miller in paying the account of Elizabeth Miller, after being informed of the pretended payment by Wm. C. Miller, and by the inconsistency of Miller's testimony with the circumstances arising in the case, and his improbable explanation of the loss of the accounts and receipts. 4 Washington, C. C. R., 123.

Hagner, for Defendant in Error:

The questions which present themselves on this record all arise upon the point of competency of witness William C. Miller. The Court below overruled the objection made, and allowed his testimony to go before the jury.

Let us establish the general principles on which the Courts at the present day proceed. Old cases stood on subtle grounds, 1 Phillips Evid. 46. Glenn *vs.* VanKapff, 2 Gill & Johnson 132.

The tendency of the present age is to allow objections to be taken rather to credibility than to competency and *competency is presumed* until *the contrary is established;* in cases of doubt witness is always received. 2 Stephens' *Nisi Prius* 1727.

Interest of witness to exclude must be *real,* not apprehended.—1 Greenleaf on Evid. 455-6.

The obligation of honor, or apprehension of moral obligation is not such *real* interest as will exclude. 1 Campbell Rep. 144. 10 New Hamp. 88. 1 Turner & Russell, 366. 4 Wendell 292. 9 John. Rep. 219. 3 Gill & John. 282.

The reason why such obligation of honor shall not exclude is very forcibly given by Phillips Evid. 54.

Because if sense of honorary obligation be powerful enough to cause the witness to pay where not legally bound, so will it *a fortiori* make him speak the truth *under oath.*

But next it is alleged that William C. Miller, as agent, is liable to a civil action at the suit of the representative of his princpal, and that therefore he was interested to protect himself.

The starting this objection brings to view the fact that William C. Miller as the agent who transacted the business is, *ex necessitate rei,* competent. Greenleaf on Evid. p. 459, also declared in case cited by the other side, 5 Johnson's Rep. 236.

But neither John Miller nor his representative could have sued said *William* for alleged breach of duty in not paying Darius Williams & Company, because by this very action they exculpate the witness and allege that he did fulfil his duty.

But even were he liable to a civil action such liability will not exclude, 1 Hall's Law Journal, 230. 1 Gill & Johnson's Rep. 366.

The cases from 3 Hill's Rep. 379, and 5 Johnson 256, cited by the other side, are clearly distinguishable from the case at bar.— That from 5 Hill 202, has no sort of bearing, for the witness here has no lien on the fund, he can have none in any event.

I will now undertake to show that William C. Miller was plainly swearing *against his interest.* Now by the testimony of Rutgers and the check on the bank, it is plain *prima facie,* that William C. Miller paid his own money to D. Williams & Company. Williams & Company, though called upon *failed to show any transaction* they ever had *with William C. Miller.* Is it not plain then that he could have sued them and recovered this money *as his own,* paid *without* consideration? Yet this very witness swears he paid it on account of his brother, and transfers to that estate the benefit, if recovery is had.

Was it not the duty of D. Williams & Company to have accounted for the possession of the check of William C. Miller, and to have shown on what account they received the money? Yet they do not do so. Their own books are produced in evidence, yet D. Williams trumps up a cock and bull story, attempting to show that the money they got credit for was sent by private hand Can any man doubt that this check took $550 from William C. Miller's credit in bank, and transferred it to D. Williams & Company? Surely no man can be so blind as not to see that. If then D. Williams & Company did send money by Dr. Pettus, it was different money from this, and if they have not credit for it in bank, it only proves their right of action against the bank.

Finally, I contend, that John Miller, in his lifetime, and John C. McGehee his administrator, since his death, have had *such a vested* interest in William C. Miller's testimony, as *utterly prevented him* from *rendering himself incompetent by subsequent interest.* Budd's testimony shows that the imputed interest did not arise until after *revival* of suit in name of administrator of John Miller.

Now the authorities on this head are plain and abundant from the

oldest times, and yet recognized in these days. Skinner Rep. 586. 1 Greenleaf on Evid. 204-462. Cowper 736. 3 D. & E. 27.—3 Levinz 152. 3 Connecticut 267. 2 Dev. 187.

See also 1 Cooke's Rep. 115.

McCants, in reply:

It is contended that plaintiff has a vested interest in the testimony of the witness Miller. But is is sufficient to reply that plaintiff himself disavows this interest by refusing to conduct the suit.

It is also contended that the liability to civil suit does not exonerate witness. But witness does not claim exemption. On the contrary, he labors anxiously to press his testimony into the cause. The cases cited on this point belong to a different rule of evidence from the one under consideration. When witness says his answer would criminate him he shall not be *compelled* to answer.

It is also contended that an honorary obligation does not disqualify.

But in this case witness engaged to pay the costs, for without it the suit would have fallen to the ground. The case of Gilpin *vs.* Vincent is a fair instance of honorary liability, and is very different from the present one.

The defendants in error rely also on the customs of banks and merchants in relation to interest of cash and checks.

But defendants have fully accounted for their credit of $550, on the 13th of March, 1848, in the bank, by the testimony of Pettus, the entry of Rouquie dated 12th March, 1838, by the pass book crediting cash, &c. Besides the general customs of banks and merchants are different, and in this case afford no ground of inference.

The case of Elizabeth Miller is deemed to stand on the same grounds, and the same views are offered in that case. Besides plaintiff cannot contradict his own witness as is attempted in this case.

DOUGLAS, Chief Justice, delivered the following opinion:

This is an action of assumpsit instituted by John Miller in his lifetime against Darius Williams and John A. Craig to recover a sum of money alleged to have been overpaid to them and money paid them by mistake. The declaration contains counts for work and labor and for an account stated and common money counts.

Darius Williams and John A. Craig, vs. John C. McGehee, Administrator.

Plea non assumpsit, upon which issue was joined and upon the trial of that issue there was a verdict and judgment for the plaintiff (in whose name the suit had been revived by *scire facias* before the trial) for the sum of $574 17. And the plaintiffs in error now seek to reverse the judgment upon the following grounds which they have assigned as error to wit: That the testimony of William C. Miller, a witness examined in behalf of the plaintiff in the action below, was not admissible by the law of the land, for that the said witness was interested in the said cause and the event thereof, as appears by the record and proceedings of said cause, and by the testimony made a part of said record. And also there is error in this, that the judgment aforesaid by the record aforesaid appears to have been given for the said John C. McGehee, Administrator of John Miller, against Darius Williams and John A. Craig Merchants, &c., whereas by the laws of the land the said judgment ought to have been given for the said Darius Williams and John A. Craig against the said John C. McGehee, Administrator as aforesaid.

The whole question depends upon the fact whether the record shows that the said William C. Miller was so situated that he would either gain or loose by the direct legal operation and effect of the judgment in this case, or that the record will be legal evidence for or against him in some other action. It must be a *certain, present, vested* interest, and not *remote* or *contingent*. If the interest is of a doubtful nature it goes to the credit of the witness and not to his competency. Being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency, and if he fails satisfactorily to establish it, witness must be sworn. 1 Greenleaf's Ev. 458.

Having premised thus much, we proceed to examine the question presented, and to test it by the record.

The deposition of William C. Miller was taken by the plaintiff in the Court below and offered in evidence at the trial, when it was objected to by the Attorney for the defendant, but his objection was overruled and the deposition was permitted to go to the jury; to which the defendant excepted and the deposition is set out in a bill of exceptions which constitutes a part of the record in this case and proves in substance, that in the year 1838 he was agent of the said John Miller and also one Elizabeth Miller. That his power from John Miller was both by parol and in writing. That John Miller was the agent of Elizabeth Miller and being his (John Miller's) acknowledg-

ed agent, he (William C. Miller) acted for both and his agency was always admitted. That he settled accounts, made payments and performed like services for both John Miller and Elizabeth Miller.— That on the 12th day of March, 1838, he settled accounts for both John Miller and Elizabeth Miller with the defendants. That he on that day gave to Darius Williams a check for $550 on the Union Bank of Florida being the supposed amount of his account against John Miller and Elizabeth Miller. That he gave the check to Darius Williams in a room he occupied at Brown's Hotel in Tallahassee. That there was no one present but Darius Williams and himself. That when he gave the check to Darius Williams at Tallahassee he had not the two accounts with him, but had the amount (as well as the witness could recollect) on a list, and he proposed when witness next went to Monticello to have them made out and the surplus or deficiency of the check for the supposed amount settled at the same time. Shortly afterwards the two accounts were as well as he (witness) recollects receipted and on his (witness,) return to Tallahassee they were left with other papers and never afterwards could be found. That he witness never had the least business transaction with Darius Williams at any time on his own account. That he never sold a check to the defendant or any one else in his life. That some time after the date of the check his brother John Miller asked him why he had not paid Darius Williams and that he stated to his brother that he had. That his brother then said Darius Williams demanded payment of him for both of the accounts and he had settled them. That the witness afterwards called on Darius Williams knowing there was an error in the business and on reference to his cash book found the amount of the check properly debited, but no credits carried to accounts of John and Elizabeth Miller. On his cross examination he was asked the direct question "are you or not interested in the event of this suit," to which he answered I do not believe myself to be legally interested in the suit. Again he was asked "are you not responsible for costs, attorney's fees, or any of the expenses connected with these suits." To which he answered the suit was brought in my brother's name; since his death I understood that the Administrator of his estate had refused to become responsible for attorney's fees or any incidental expenses. I have therefore for the benefit of the estate of John Miller assumed the expenses, although I do not consider myself legally bound for them. The witness was shown the check and recognized it. It is as follows.

Tallahassee, March 13th, 1838.

$550. Cashier of the Union Bank of Florida pay to D. Williams & Co. or bearer Five Hundred and fifty dollars.

In pencil (at Cr. D. Williams & Co.) W. C. MILLER.

William Budd, a witness introduced by the plaintiff to explain the testimony of William C. Miller, testified that he was Clerk of the Superior Court of the Middle District of Florida for Jefferson county, at the time of the institution of this suit and at the death of the original plaintiff. That after the issuing of the *scire facias* to revive said suit William C. Miller the witness verbally stated that he would pay the expenses of the suit, meaning the costs of the court as witness understood, but said William C. Miller did not enter into any written agreement. There was ill feeling between said William C. Miller and the Administrator of John Miller, and said William C. Miller said he heard that said Administrator had refused to become responsible for the costs. But this was after the suit had been revived in the name of the administrator and after costs had been incurred. The plaintiff's attorneys without objection and with consent of defendant's attorney then stated as evidence before the court, that William C. Miller had entered into no engagement with them to pay atorney's fees or any other expenses and was not bound for any part. The deposition of Henry L. Rutgers was also offered by the plaintiff's counsel, which was read to the jury and proves in substance that he had known the parties for at least seven years; that he was paying and receiving teller of the Union Bank of Florida in the month of March, 1838. That Darius Williams & Co., had an account with that Bank before and after that date, that on the 13th day of March, 1838, Darius Williams & Co. deposited a check in bank to their credit for five hundred and fifty dollars. "Check D. Williams & Co., $550," in my own hand writing (said the witness) is the form of the entry. That on the same day a check of $550 was debited to the account of William C. Miller, and a similar amount was credited to the defendants. The entry in the Ledger is "W. C. Miller, March 13th, 1838, by cash $550" and in Walter Veitch's hand writing. Said Veitch is dead. The form of the entry in the cash book of the bank is "D. Williams & Co. 13th March, 1838, credited by $550," and on the same day W. C. Miller debited with $550 all in the same hand writing of Walter Veitch the book keeper of the Bank since deceased. There is no other of like amount of that date.

The plaintiff's counsel then gave in evidence the admission of the defendant that John Miller's account of $332 23-100 was paid to said defendants on the 19th of February, 1838, said account was paid by John Miller in person.

The defendant by his counsel to sustain the issue on his part then offered Dr. John G. Pettus who deposed and said—that in the Spring of 1838 he carried from Monticello to Tallahassee a sum of money, it was $500 to be deposited in the Union Bank of Florida in favor of Darius Williams & Co. That said money was handed to him in Monticello by Darius Williams the defendant. That he left Monticello on one day and on the next he deposited said money in said Bank and then returned to Monticello on the same day of making said deposite. That he left Darius Wiliams in Monticello and on his return saw him still at Monticello; it was in the Spring; it was about March; he says he never carried down money but once for said Wiliams; it was about $500; it was not as late as May; the sum was $500.

Defendants counsel then offered William Budd who deposed and said that he knew Gabriel Rouquie—he was dead—he was a clerk for Darius Williams & Co. Knew his hand writing. Defendants counsel then showed said witness a book of accounts of said Darius Williams & Co. and an entry in the same thus "1838, March 12, Union Bank deposits sent by Dr. Pettus, $550." Witness stated it was the hand writing of the said Gabriel Rouquie. Witness further said he had been a merchant. It was not usual to make such entries of deposites of cash.

Defendants counsel then offered and read the deposition of Henry L. Rutgers in which he testified (in substance) that he was well acquainted with Walter Veitch during his life. He held the office of book keeper in the Union Bank of Florida. He is dead. That he (witness) is well acquainted with said Veitch's hand writing and that the entry in the annexed Bank Book marked A., of the 13th March, 1838, is in the hand writing of said Veitch. This entry is on page 9, and is as follows: "March 13th, 1838, cash $550." That the Bank Book referred to is the regular pass book of the defendants with the Union Bank. That the pass books are generally in the hands of the depositors. When a deposite is made if the book is handed to the Teller he makes the entry; if not, when the book is written up or balanced the book keeper makes the entry from the books of the bank. I do not think (said the witness) that the entries were always made on the pass book at the time of deposi-

ting, for on page five you will perceive that the entries ran thus: April, May, March and April, 1837, which show conclusively that the entries were not always made in the pass book at the time of depositing but afterwards when the bank book was written up or balanced. The witness said further that there was no other entry on the books of the bank on the 13th March, 1838, to the credit of defendants.

The defendants then offered and read the entry in pass book A above referred to in said deposition thus "1838, March 13th, cash $550." The defendants counsel then offered the admission in relation to the two accounts referred to by William C. Miller in his deposition, one for $332 20-100 and the other $181.13. That the former was paid in February, 1838, and the latter in July of the same year. Here the evidence closed and we deem it proper to say that we have made this full statement of it, not so much because we deemed it necessary to a decision of the questions presented for our consideration as for the satisfaction of the parties and especially of the plaintiffs in error and their counsel who brought this case up and so zealously and ably argued it here, and because he assumed the position in argument though he has not assigned it as error: "If we admit the testimony of William C. Miller it proves that the witness' own money and not that of the plaintiff's was paid to the defendants, and in a sum different from the accounts of John and Elizabeth Miller, and that to enable the plaintiff to recover he must prove that it was his own money that was paid."

It seemed proper therefore that we should set out the evidence very much at length in order that by a comparison of the whole it might be seen whether that is the correct view of the matter or not; for notwiithstanding it might seem from the testimony of William C. Miller himself that the money paid was his own, yet that might be explained by other parts of the testimony and the money shown to be that of his principles (John and Elizabeth Miller.) And here we may be permitted to remark, *"en passant,"* that if the money was his own, he shows himself in regard to it a most disinterested witness, as he comes to testify most strongly against his own interest, and it can hardly be supposed that if the money had been his own he would thus without objection have yielded all claims to it in favor of his brother's estate, and it is difficult too to account for the question by John Miller to the witness, "Why he had not paid Darius Williams," but upon the supposition that he (the witness) had funds of

John Miller in his hands wherewith to pay his accounts due Williams. And if it had been otherwise, and William C. Miller paid his own money, it would have been quite natural that some explanation should have taken place between them on the subject when William C. Miller told his brother that he had paid the account of Williams against him. Had it been clearly and conclusively shown by undoubted and unrebutted proof that the money paid to the defendants was the money of the witness William C. Miller, it would perhaps have been our duty to reverse this judgment for that cause, although it was not assigned for error, for the rule of law upon this subject as stated by counsel for the plaintiff's in error, seems to be well sustained by authority. Moore vs. Pyrke, 11 East. Reps. 52. Archbold's *Nisi Prius,* 186. Bradshaw *vs.* Bradshaw, 11 Law Journal, 5.

The count for money paid cannot be maintained, (said Parke, J., Power *vs.* Butcher, 10 B. & C., 310,) without proving actual payment.

But it has not been thus shown; and in regard to this question, as well as of all others that arise out of the discrepancies and seeming contradictions in the testimony, it is sufficient to observe, that they were matters peculiarly proper for the consideration and decision of the jury to whom they were submitted, and whose verdict upon them should not be lightly disturbed by this court.

We proceed, therefore, to the errors assigned, or rather *the error.*

The only question presented by the assignment of errors for our consideration, to-wit: was the witness, William C. Miller, when he testified in the cause interested therein, or in the event thereof? being embraced in the first error assigned.

It is contended that the plaintiff had refused to conduct the suit and that in consequence thereof the witness had assumed the payment of the costs, but it does not appear that he had entered into any specific engagement with any one, or made any stipulation by which he was legally bound to pay them. There is no proof that he had spoken to any body on the subject except William Budd the Clerk of the court and he does not say that William C. Miller made any direct or express promise even to him, to pay them. His language is 'William C. Miller the witness stated verbally that he would pay the expenses of the suit meaning the costs of the court as he understood.' This does not import any specific engagement. If any such had been made with Mr. Budd it is presumable that he would have

understood the terms of it more definitely. Nor is there any evidence that the plaintiff had refused to conduct the suit, on the contrary the evidence appears to show pretty clearly that he was prosecuting it. Mr. Budd states that the suit had been revived and costs incurred before the statement was made by William C. Miller that he would pay the expenses and the record shows that he continued to prosecute it. The statement of the witness Miller to Mr. Budd seems therefore to have been made under a misapprehension of the facts in relation to that matter, and the attorneys for the plaintiff state expressly that he, William C. Miller, entered into no engagement with them to pay attorney's fees or *any other expenses*, and was not bound for any part. And it must be recollected that upon his cross examination he was expressly asked "are you not interested in the event of this suit," and that he answered "I do not believe myself to be legally interested in the suit." In reply to another question however he said "I have for the benefit of the estate of John Miller assumed the expenses although I do not consider myself legally bound for them." He was evidently referring to what he had said in the hearing of Mr. Budd, for he states almost word for word what Mr. Budd testified that he had said upon that occasion. That he took the correct view of his legal rights so far as they are disclosed by the record in relation to this matter we have no doubt, and if any obligation rested upon him to pay, it was a mere honorary or moral one which did not render him incompetent, since the court can never know whether the obligation thus set up as a ground of incompetency has any real existence in the mind of the witness. Bent *vs.* Baker, 42 Law Lib. page, 99. 4 Sergent & Rawle, 226. Gilpin *vs.* Vincent, 9 John. 220. Moore *vs.* Hitchcock, 4 Wendell, 297. Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice as a motive for conduct, and besides where the sense of honor is so strong and binding as to influence a witness against his interest, it must be unnecessary to reject him, as the same principle which would induce him to pay the costs would oblige him in giving his evidence, to speak only the truth. 1 Phillip's Ev. 54.

The tendency of the present age, is to allow objections to be taken rather to the credibility than to the competency, and competency is always presumed until the contrary is established. 2 Stevens, Nisi Pr. 1727. The ends of justice are most effectually attained by a full and complete investigation of the subject in dispute, and

unless the objection to the witness is strictly a legal objection he will be admitted to give evidence. 1 Phillip's Ev. 54. It is not an objection to the competency of a witness that he has wishes or a strong bias on the subject matter of the suit, or that he expects some benefit from the result of the trial. 1 Phill. Ev. 47. Stewart *vs.* Kip., 5 John. Reps. 256. Such circumstances may influence his mind and affect his credibility, they are therefore open to observation and ought to be carefully weighed by the jury, who are to determine what dependence they can place upon his testimony, but they will not render him incompetent. Miles *vs.* O'Hara, 1 Sergeant and Rawle 32. Boulder *vs.* Herbert, 17 Sergeant & Rawle, 312.—Griswold *vs.* Ledwick, 1 Wendell 126. So far therefore as regards any liability to the payment of costs in this case arising from the supposed asumption of, or agreement by the witness, William C. Miller, to pay them, there is nothing to affect his competency.

But it is insisted by the attorney for the plaintiff in error on the argument of this cause that if William C. Miller had the money of his principal and paid it, a recovery in this case would entitle him to a credit, with his principal, but he was equally entitled in that case to the credit without such recovery. It was the payment of the money that entitled him to the credit and not the recovery.

It was also suggested that if he paid his own money a recovery in this suit would also entitle him to such credit, to which (if he paid it on the request of John Miller) the same answer may be given, but if he paid it voluntarily without such request he would not have any legal claim on John Miller or his estate for the amount, for one man cannot thus make another his debtor against his will or without his consent. Stokes *vs.* Lewis, 1 Term Rep. 20. 1 Saund. Reps. 264, n. Per Lord Kenyon, Exall *vs.* Partridge, 8 Term Reps., 310.—Cummings *vs.* Forrester, 1 Maule and Sel. 500. "No man can by a voluntary payment of the debt of another make himself that mans creditor and recover from him the amount of the debt so paid."—Lord Kenyon, Chief Justice, Child *vs.* Morley, 8 Term Rep., 613. Lightfoot *vs.* Creed, 8 Taunt. 268, (4 Eng. C. L. 100.)

But with respect to both these matters it is proper to remark that this transaction occurred in 1838 more than seven years before the deposition of the said Wiliam C. Miller above mentioned was taken, and that if he ever had any claim upon or right to a credit with the said John Miller, or if said John Miller had any claim on him on account of the money alleged by the witness, William C. Miller, to

have been paid to the defendants in this case, such claims were barred by the statute of limitation at the expiration of five years from the time when the payment was made, and consequently the interest of the witness at the time when his deposition was taken was not that certain, present, vested interest, which we have seen is necssary to render a witness incompetent, but had by lapse of time become *remote, contingent,* and of a doubtful nature—an interest which goes to the credit of the witness, and not to his competency. 1 Greenleaf's Evidence 458. Dudley *vs.* Balles, 24 Wendell's Reps., 357 to 370 (and authorities there cited,) Cutter *vs.* Rathburn, 3 Hill's N. Y. Reps. 577 to 281. Even if it were doubtful upon the cases say the Court in 24 Wendell 371, and in 3 Hill 581, we ought to decide in favor of the competency.

And besides if money has been overpaid by a servant or agent or paid by mistake, he is a competent witness for his principal in an action to recover it back. 1 Phillip's Ev. 129—130. Martin *vs.* Howell, 1 Strange 647. Baker *vs.* Macrae, 3 Camp. 144. United States Bank *vs.* Stearnes, 15 Wendell 314. Franklin Bank *vs.* Freeman, 16 Pick. 528, 529, 534. 2 John. Reps. 189. 1 John C. 408.

It is (said the Court in the case of Stafford Bank *vs.* Cornell, 1 N. Hamp. Rep., 192,) the constant practice to admit agents to be witnesses for their principals without a release although their evidence may tend to discharge themselves.

Again it has been contended that "Wm. C. Miller's testimony if admitted was overbalanced by the testimony of Pettus, the entry of Rouquie, the pass books, the evidence of John Miller in paying the account of Elizabeth Miller after being informed of the pretended payment of Wm. C. Miller, and by the inconsistency of Miller's testimony with the circumstances arising in the case and his improbable explanation of the loss of the accounts and receipts." All these we repeat were matters for the jury to whom they were submitted, and are not matters proper for the investigation and determination of this court, and we could not determine them without invading the undeniable and exclusive prerogative of the jury, viz: The right of deciding on all matters of fact as to which contradictory evidence may be adduced. 7 Harr. and John. 294.

Upon a full and thorough examination of the record and proceedings in this case, we are of opinion that they contain no error.

The judgment of the Court below is therefore affirmed.

Per curiam.

DARIUS WILLIAMS AND JOHN A. CRAIG, *vs.* ELIZABETH MILLER.

Error to the Jefferson Circuit Court.

Per Curiam:—This case depends to a certain extent upon the same principles involved in the case of Darius Williams and John A. Craig *vs.* John C. McGehee, administrator, &c., of John Miller deceased, which has just now been decided. It was argued and submitted together with that case, and it was understood would share the same fate.

The judgment of the court below is therefore affirmed.

JOHN DOE, ON DEMISE OF FLORENTIO COMMYNS, ET AL., *vs.* WILLIAM K. LATIMER, TENANT, &C.

Where a *concession* of land in 1817 by the Spanish authorities of West Florida was made "subject to the conditions prescribed in the regulations of 17th July, 1799"—and the decree of concession concluded with an order "that the land be surveyed and marked by the surveyor, to be submitted to the superior authority—costs to be taxed"—and no further steps appeared to have been taken to comply with the conditions or to complete the grant, anterior to the cession of the Floridas by Spain to the United States—Held, that such concession is not evidence of title.

A government or individual who makes a grant of land upon a condition precedent, may waive or dispense with a compliance therewith, so long as it, or he holds the revision; but when it, or he conveys that reversionary interest, the right to do so ceases.

A grant of land, by the description of "the tract of land at the point of the Flag Staff," and without any further designation, to give a place of beginning for a survey, is void, for being so uncertain that locality cannot be given to the land.

Writ of Error to Escambia Circuit Court.

The case is stated in the opinion of the court.

Anderson, for plaintiff in error:

The evidence proposed to be offered to the jury, and which the court below ruled out, was opposed upon the following grounds:

1. The incapacity of Masot, the Governor of West Florida, to make a valid grant.

To this objection it is replied, that the Supreme Court of the U. S. have decided in the cases of Sanlard, (4 Peters Rep.) Arredondo, (6 Peters Rep.,) Clark, (8 Peters Rep.,) Mitchell, 9 (Peters Rep.,) and others, that upon the production of a grant the presumption of law arises that there was full authority to make it, unless the contrary be shown. By the comity of nations the tribunals of all countries are to presume that every public officer of a foreign government acts within the legitimate sphere of his duty till the contrary be shown.

In the absence of the Intendant, the Governor was the highest officer.

Intendant Cabannos left the country in 1815, and there was no officer of that grade in West Florida afterwards. The grant in question was made in 1817. The authority quoted from 8th Peters is not applicable to the then condition of West Florida. As proof of this, see testimony of Caro as to 81 grants made by Gov. Masot, having been confirmed by the U. S. Commissioners.

Grants made by the Governors of East Florida in the absence of higher authority, acknowledged as sufficient. U. S. *vs.* Perchman, 7 Peters. U. S. *vs.* Fernandez, 10 Peters. U. S. *vs.* Lequi, 10 P. R. U. S. *vs.* Chaires, 10 Peters. U. S. *vs.* Leton, 10 Peters.

2. The evidence was opposed on the ground that the grant wanted *finality,* and was only preliminary to a complete title.

This objection is met by the terms of the grant itself. Governor Masot says: "The 800 arpens of land *are hereby granted* to the said Francisco Rocheblave," &c. The word *hereby* imports that the act then done by the Governor conveyed a consummate title.

See the evidence of Caro as to similar grants, and the cases above cited as to similar grants in East Florida.

3. The evidence was opposed on the ground that the grant wanted sufficient certainty.

The tract of land in question is designated in the papers as "The tract commonly known by (as) the Point of the Flag Staff." It

might have been made sufficiently certain by other evidence, if the rejected evidence had gone to the jury as a foundation. The lessors might have proved possession in their ancestors. Though 800 arpens are sued for, and the whole might not have been recovered for want of a survey. The plaintiff in ejectment might recover a *part* of what is described in his declaration.

Lessee of Patton *vs.* Cooper, 1 Cook's Rep., 133. The right of possession to the point of the Flag Staff, is distinct from the right of possession to 800 arpens of land—the former needed no survey to be rendered certain. It was error to deprive the plaintiff of the additional evidence.

4. It is objected in the arguments of defendant's counsel, that there was no evidence of a compliance with the regulations of Morales.

It is only necessary to reply to this, that the question does not arise upon the exceptions, it was a question for the jury.

5. It is objected lastly that the evidence of Rocheblave's title was not evidence of the title of the lessors.

It is not pretended that it was in itself—it was offered as a link in the chain. Francisco Rocheblave was the ancestor of the lessors as would have been proved to the jury, had not the plaintiff been arrested in making out his case by the court in rejecting the foundation of his title.

Yonge, for defendant in error:

I. That the court properly ruled out the answer of Caro to question as stated in the first exception, as well for the reason there stated to wit: That it was not the best evidence of which the case in its nature was susceptible, (Greenleaf's Evidence, 93,) as for the further reason that it was immaterial to the issue, if nothing did appear upon the records of his office that showed that the Spanish Authorities did not require the performance of conditions of land grants, that fact was not material to the issue. And it was immaterial for two reasons. *First.* The absence of such record would not prove that they did not require performance of such conditions, for there was no reason *that the records* of *his office,* should show anything about it. And *secondly,* it was immaterial, because if the Spanish Authorities chose in their munificence to dispense with the performance of conditions of such grants, it was as a boon to the grantee.

The United States by their treaty with Spain contracted that "all grants of land made before the 24th January, 1818, by his Catholic Majesty or by his lawful authorities in said territories ceded by his Majesty, shall be ratified and confirmed to the persons in possession of them to the same extent, that the same grants *would be valid,* if the territories had remained under the dominion of his Catholic Majesty." It is clear that this and all conditional grants would not have been valid under the dominion of his Catholic Majesty, until the conditions had been performed or dispensed with, and the United States did not agree to dispense with conditions.

II. In ruling that the paper writing purporting to be a grant from Governor Masot to Rocheblave, should not be permitted to go to the jury as evidence of title, the court decided rightly for the following reasons:

1st. That the grant, if grant it be, is void for uncertainty. 4 Bacon's Abridgement, Title Grant.

It is essential to the validity of a grant, that the thing granted be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony. Buyck et al., *vs.* U. S., 15th Peters, 223, 224, 225. O'Hara's case, 15th Peters, 281, 282, 283. Delespine's case, 15th Peters, 319.

The sheriff would not know what lands to deliver into the possession of the plaintiff, should he recover judgment and obtain his writ of possession.

III. The paper purporting to be a grant, is not a grant that conveys any legal title, but is only a preliminary step towards procuring a final and complete title. See Regulations of Morales, 2 White 235, Art. 4, 15, 16, & 18.

"The word grant may comprehend both the incipient and complete title." U. S. *vs.* Clarke, 8th Peters, 450.

IV. The power of granting lands was not vested in the Governor of West Florida at the time this grant was made, but in the Intendant. United States *vs.* Clarke, 8th Peters, 451, & 452.

V. The grant is void, for the reason that the conditions which attached to it, by the operation of the regulations of Morales, under which it was made, have not been shown to have been complied with. Buyck's Case, 15 Peters, 222. O'Harra's case, 15 Peters, 281, 282.

VI. Grant void for want of survey. U. S. *vs.* Miranda, 16th Peters, 156.

VII. The title claimed is at best but an equitable one, and though it presents such a case as the court established for the purpose of adjudicating land claims growing out of Spanish grants might possibly recognize, still there is shown no legal title, and ejectment cannot be sustained on an equitable title. Swayze and wife *vs.* Burke et al., 12 Peters, 23.

VIII. No derangement of the title from the grantee to the lessor of plaintiff.

"Person who is supposed to have demised the premises must be shown to have had a legal power to demise." 12 Johns., 185.

DOUGLAS, Chief Justice, delivered the following:

This is an action of ejectment, instituted by the plaintiffs in the Circuit Court of Escambia county, against William K. Latimer, tenant in possession, to recover a tract of land claimed under a concession alleged to have been made by Masot, Governor *pro tem.* of the Province of West Florida, to one Francisco Rocheblave, on the 25th day of November, 1817. The declaration, notice, consent, rule, and plea, (upon which issue was joined,) are in the usual form. At the last November term of that court, the cause came on for trial, and the issue was submitted to a jury, who returned a verdict for the defendant, upon which verdict a judgment was duly entered, upon which this writ of error is prosecuted.

The following bill of exceptions is set out in the record, upon which all the errors complained of in this case are assigned, viz:

Be it remembered, that, on the trial of this case of John Doe, on the demise of Florentio T. Commyns *vs.* William K. Latimer, the plaintiffs offered in evidence of their title to the premises in controversy a paper writing, of which the following was proved to be a true translation, to wit:

PETITION.

To His Excellency, the Governor and sub-delegate of Royal Finance:

Francisco Rocheblave, an inhibitant of this town, with due respect, says: that being desirous to make an establishment, and knowing that the tract of land commonly known by the point of the Flag Staff is vacant, he humbly entreats your Excellency that you have the goodness to grant him eight hundred arpens in

the place described above, a favor which he hopes to receive from the equity of your Excellency.

[Signed] FRANCISCO ROCHEBLAVE.

PENSACOLA, November 13th, 1817.

DECREE.

PENSACOLA, *November* 24, 1817.

Let the surveyor General report whether the lands prayed for by the petitioner are vacant, and of the Royal Domain, and if being such, let this pass to the view of the Seignor Fiscal of Royal Finance.

[Signed.] MASOT.

[Countersigned.] JOSE CEVALLOS.

SURVEYOR'S REPORT.

To His Excellency, the Governor and sub-delegate:

The tract of land prayed for by the petitioner at the point of the Flag Staff is vacant, and there is no difficulty that it should be granted to him—nevertheless, your Excellency will decide as you may think proper.

[Signed.] PEDRO REGGIO.

PENSACOLA, November 23d, 1817.

FISCAL'S OPINION.

The Fiscal of Royal Treasury, having seen the petition of Francisco Rocheblave, praying for eight hundred arpens of land at the place indicated, and for the purpose expressed by him, the same being vacant, according to the report of the Surveyor, Pedro Reggio, says that your Excellency may, if you think proper, grant him the tract of land of eight hundred arpens in the spot designated, the Fiscal considering him provided with sufficient means for the undertaking as it required, remaining subject to the conditions prescribed in the regulations of 17th July, 1799, and that he shall not alien it to any foreigner, conformable to justice which he asked.

[Signed.] MANUEL ARMIREZ.

PENSACOLA, November 24, 1817.

NOTIFICATION.

On the same day we made it known to Francisco Rocheblave, which we certify.

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[Signed.] LAUSA.

[Signed.] CEVALLOS.

On the same month and year, before Jose Masot, Governor *pro*

tem., for the Province of West Florida, and sub-delegate of Royal Treasury in the same, personally appeared Francisco Rocheblave, for the purpose of taking the oath required by the preceding Fiscal's opinion, and having done so in a legal manner, said that the tract of land which he solicits he wants for himself—that no foreigner has any share in his solicitation, and less will he alienate it to any such persons. He declares that the above statement is the truth under the oath he has taken and signed it with his honor, and we the assistant witnesses, to which we certify.

[Signed,] FRANCISCO ROCHEBLAVE,
DOMINGO LAUSA,
JOSE CEVALLOS.

DECREE OF CONCESSION.

PENSACOLA, *25th November*, 1817.

In consequence of the report of the Surveyor appointed, that the land solicited by the petitioner is vacant, and of the Royal Domain, he having also taken the oath required by his Honor the Fiscal of Royal Treasury, the eight hundred arpens of land are hereby granted to the said Francisco Rocheblave in the spot designated. Let them be surveyed and marked out by the Surveyor, to be submitted to the superior authority. Costs to be taxed.

[Signed,] MASOT,
DOMINGO LAUSA,
JOSE CEVALLOS.

Jose E. Caro was then sworn, and said that he was well acquainted with the hand-writing of Masot, Governor, and sub-delegate of Royal Finance of West Florida, whose name is affixed to said paper writing, and of Manuel Armirez, Fiscal of the Royal Treasury, and of Cevallos and Lausa, witnesses of assistance, having often seen them write, and that he believes the signatures of the same to be genuine; but that he is not acquainted with the hand-writing of Pedro Reggio, Deputy Surveyor, never having seen him write, but that he has seen his name affixed to a great number of grants, afterwards approved by the United States Land Commissioners, and that this signature resembles all the others, and he therefore believes this to be his genuine signature. Deponent further says that Intendant Morales left in 1813, and that Cobannos was appointed in his stead, who also left here in 1815, after which time there was no officer here answering to that of Intendant. That

the power to sell lots was in 1813 vested in the Cabildo, and that Governor Masot made some eighty grants of land similar in form to the grant above set forth; that, at the time this grant is dated, there was no Intendant, but there was one in Havana, who ratified and confirmed two grants made by Masot for large grants of land—. one of 7,000 arpens, and one for 3,500. Pedro Reggio was Deputy Surveyor, and received his appointment from the principal surveyor, who resided in Havana; that, when Morales was here, in him was vested the sole power of granting land, and this grant is in the same form with the others made by Masot.

The plaintiff further asked said witness if it was customary after 1813 for the Spanish Government to grant complete title to lands, without requiring proof of the performance of conditions of cultivation and habitation? The witness answered that there was nothing in the records of his office, that shewed that the Spanish authorities in a single instance required compliance with the conditions.

The court ruled out this answer, on the ground that the record must be produced, it being the highest evidence, to which decision the plaintiff excepts.

The court decided that the above paper writing should not be permitted to go to the jury as evidence of title, to which decision the plaintiff also excepts, and prays the court to sign and seal this bill of exceptions, which is accordingly done.

The following are the errors assigned:

First. When the plaintiff on the trial of said cause asked the witness, Joseph E. Caro, if it was customary after 1813 for the Spanish Government to grant complete titles to lands, without requiring proof of performance of conditions of cultivation and habitation; and the said witness answered, that there was nothing in the records of his office that showed that the Spanish authorities in a single instance required compliance with the conditions. The court ruled out the answer, on the ground that the record must be produced, being the highest evidence.

Second. When the plaintiff offered as evidence of title of the lessor to the premises in controversy a paper writing, of which a true translation is set forth in said plaintiff's bill of exceptions, and proved the same by the witness, Joseph E. Caro, as set forth in said bill of exceptions, the said court decided that the said paper writing should not be permitted to go to the jury.

In regard to the first error assigned, it may be remarked, that both

the question to, and the answer of the witness, appear to be wholly immaterial. There is nothing in the record to show that any application was made after the year 1813, to the Spanish authorities in the province of West Florida, by any one holding a conditional concession for a *real* or *complete title,* or that the question in any way arose whether a title would be granted without a compliance with the conditions or not, nor does it appear that the witness, Mr. Caro, kept an office in which, if there was any record evidence that the Spanish authorities had required the performance of such conditions, such evidence might be supposed to exist. Had it been shewn, however, that Mr. Caro was keeper of the Public Archives, and had charge of the records and documents left by the Spanish Government on the transfer of the province to the United States, which we think likely (from the shape of the question put to him by the plaintiff) was the fact, still the answer (which by-the-by was not at all responsive to the question) is wholly immaterial, because the question to be settled is not whether it is customary for the Spanish authorities in West Florida, after the year 1813, to require proof of cultivation and habitation before granting complete titles to land, but whether such proof was required by the laws, royal orders and regulations in force in the Province after that time on this subject.

That a government or an individual, who makes a grant of land upon a condition precedent, may waive or dispense with a compliance therewith, and convey a full, absolute and complete title without a performance of it, so long as he holds the reversion, and the interest of no one else can be in anywise prejudiced by such conveyance cannot be doubted. But when he conveys that reversionary interest to a third persons, his right to do ceases.

Here the Spanish Government had by the treaty of cession between it and the United States of the 22d of February, 1819, transferred its whole and entire interest in the public domain in the Floridas, including all such reversionary interests, to the latter. See U. S. Statutes at Large, 258. And their interests, it is apprehended, are governed by laws, ordinances and regulations referred to. The Spanish authorities of the Province of West Florida, may have had very good reasons, (or such as they may have deemed good,) for relaxing the rule or dispensing with a compliance with such conditions in individual instances, or indeed including a general class of claims which might not apply to this,and if they did,would not affect the legal question. They may have dispensed with a compliance with the

conditions, because the grantee had been unfortunate, or perhaps by some act of Providence may have been rendered unable to perform them, or because after the concession was made, the grantee had rendered some important services to the Government. Governor Kindelan relaxed the rule requiring performance of such conditions in East Florida in 1815, on account of Indian hostilities, so far as to grant absolute titles to settlers who had actually built houses and improved their lands, although the *ten years* settlement (then required by the regulations of Governor White,) was not complete.—2 White's New Rec., 288. See White's regulations as to occupation and cultivation.

The relaxation of the rule by the Spanish authorities in certain cases for special reasons, would not and could not affect the general rule prescribed by the laws, ordinances, and regulations then in force.

In the case of the United States *vs.* Kingsley, 12 Peters Rep., 486, it was strongly urged in behalf of the claimant, that no instance was known of lands so decreed having reverted to the class of public lands, for the non-performance of the conditions. This is like the negative testimony offered in the case before us. Here no proof of any such current of cases appears, or is shewn to have been offered, and after the year 1815, the Intendant,the *superior authority* to whom the *process verbal* was to be sent, and who alone it would seem had the right to dispense with performance of the conditions upon which a grant was made, did not, as we are informed by the testimony of Mr. Caro, reside in the Province.

The power to grant lands was in October, 1798, reconferred on the Intendant (from whom it seems to have been for a time withdrawn,) so far as respected Louisiana and West Florida, but this order does not extend to East Florida. There it remained with the Governor. The United States *vs.* Clark, 8 Peters, 152. And nothing is shewn or even suggested to take this case out of that rule.—Whether therefore the court erred or not in ruling out this answer of the witness, Mr. Caro, it does not vary the case of the plaintiffs. They have sustained no injury by its rejection, and where a party has sustained no injury by the rejection of admissible testimony, he cannot avail himself of the mistake to reverse the judgment.—Smith *vs.* Ruecastle, 2 Halsted's Rep., 357. Overby *vs.* Paine, 3. J. J. Marsh, 717. Bosley *vs.* Chesapeake In. Co., 3 Gill and John., 450.

We proceed therefore to the discussion of the second error assigned, which we think cannot be sustained for several reasons. The document the rejection of which is assigned for error, is called a Grant, which may comprehend both the *incipient* and the complete title.— The greater number of those in Florida appear to have been of the *first* description. Many of them contained conditions, on the performance of which the right to demand a complete title depended. The United States *vs.* Clark, 8 Peters, 450. The one now under consideration is of this description. It purports to have been made by Masot Governor *pro tem,* of West Florida, and sub delegate, &c., on the 25th day of November, 1817. At that time the regulations of Morales were in full force, and were the laws of the Province of West Florida on the subject of the granting of land. Ibidem. The first article of these regulations provided that to each newly-arrived family (*a chaque famille nouvelle*) who are possessed of the necessary qualifications to be admitted among the number of cultivators of these Provinces, and who have obtained permission of the Government to establish themselves on a place which they may have chosen, there shall be granted, for once, if it is on the bank of the Mississippi, four, six or eight arpens in front on the river, by the ordinary depth of forty arpens, and if it is in any other place, the quantity which they shall be adjudged capable to cultivate, and which shall be deemed necessary for pasture of his beasts, in proportion, according to the number of which his family is composed understanding that the concession is never to exceed eight hundred arpens. 2 White's New Rec., 234.

The report of the Fiscal in the case now before us, considering the petitioner provided with sufficient means for the undertaking required, appears to have been made with an especial view to this, and to the 4th article, and the quantity of land in this concession is we see extended to the maximum allowed to be granted.

The fourth article of the regulations provides that "the new settlers who have obtained lands shall be equally obliged to clear and put into cultivation in the precise time of three years all the front of their concessions of the depth of at least two arpens in the penalty of having the lands granted *remitted to the domain,* if that condition was not complied with. 2 White's New Rec., 234, 235. In this case no proof whatever appears of a compliance with these conditions.

There were three classes of grants made in the Floridas. *First,* absolute grants in consideration of services already performed,

which were made by the Governors in special cases, either in virtue of special power recognized by the laws of the Indies (2 White's New Rec. 38, 40, 52) or by the authority given in particular decrees coming directly or indirectly from the sovereign, as in the case of grants conferred upon Ygnacie Salens, Don Manuel Paulin and Don Juan Perchaman by Governor Estrado of East Florida pursuant to a Royal order March 29th, 1815. 2 White's New Rec. 280. *Second.* Grants in consideration of services to be performed, and deemed specially important, for the improvement of the province. These do not seem to have grown out of any law or Royal order, but were not unfrequent for some years before the cession of Florida to the United States. Ibid. 286, 289, 290. *Third.* But the greater number of cases was that of gratuitous grants in moderate quantities for purposes of actual occupation and cultivation. To this class is applicable the general system of Spanish land law, which existed in Florida and Louisiana, and the regulations embraced under it are as clear and distinct as those of the laws of the United States. It is true the grants were gratuitous but the performance of the conditions annexed by that law, was a consideration as explicit as the payment required by our laws.

The United States *vs.* Wiggins, Arguendo, 14 Peters, 340. The regulations in regard to these grants are first found in the laws of the Indies promulgated by the King of Spain in 1682. By these laws grants were distributed by the Governors to settlers, on condition that they should take actual possession of the lands granted in three months and build upon and cultivate them, and after four years of such occupation they were entitled to hold the lands in absolute property. White's New Rec. 48, 50, 51. The *incipient* grant called a concession, was deposited in the office of the Governor's Secretary, but on proof of the necessary occupation and cultivation the seller received an absolute grant or (as it was called) a *Real title* (*a titulo de propriedad*) which was recorded in the office of the Escribano or Notary of the Province. Ibid, 282.

The quantity to be given to each settler was not prescribed by the laws of the Indies, but the Governors were directed to graduate it and it was different in different provinces. These regulations were subsequently recognized by the King of Spain in his Royal orders of 1735, 1754 and 1768. Ibid, 62, 64 & 71. The United States *vs.* Clarke, 8 Peters 450. And in the latter it is declared that, "where any shall not apply themselves in a proper manner to improve the

lands allotted to them the same shall be taken from them (which I do said the King *without mercy*) and granted to others who will fulfil the conditions."

In the case of the United States *vs.* Wiggins above cited, the grant was for three hundred acres which she asked the Governor to grant her on the eastern side of the pond of St. George, as she had five children and five slaves with herself. The decree of the Governor is in the following words, viz: "The tract which the interested party solicits is granted to her without prejudice to a third party and for the security thereof let a certified copy of this instance and decree be issued to her from the secretary's office.

[Signed,] ESTRADO."

This grant it will be perceived is (like the one now under consideration,) without any express condition as to occupancy and cultivation upon the face of it, but it was made when the regulations of Governor White were in force in East Florida, which required the grantee to take possession of, and cultivate the land within six months from the date of the concession, and to continue to occupy and cultivate them for ten years to acquire the right to an absolute title. And Mr. Justice Catron who delivered the opinion of the court in that case after discussing the question as to the validity of the title paper (a certificate of Aguilar, Secretary of the Government, at the time when it bears date) says: "The next question is, does the concession convey with it the conditions *imposed by law* on those having lands given them? By the regulations of Governor White published in 1803, it was provided that all concessions without time specified, shall be *void*, if the grantees do not appear to take possession of them within the term of six months. In the concession to Mrs. Wiggins, no time is specified for the settlement, and the Government of the United States (said the court) may take advantage of the non performance of the conditions prescribed by law if the 8th article of the treaty with Spain does not provide for the omission. It stipulates that grants of land made before the 24th day of January, 1818, shall be ratified and confirmed to the persons in possession of the lands, to the same extent, that the same grants would be valid if the Territories had remained under the dominion of Spain." Ibid. 349, (and see 8 United States statutes at large 258.)

"That perfect titles (continued the court) made by Spain before the 24th day of January, 1818, within the ceded Territory are in-

trinsically valid and exempt from the provisions of the 8th article, is the established doctrine of this court, and needs no sanction from the legislative or judicial departments of this country.

"But there were at the date of the treaty, very many claims whose validity depended upon the performance of conditions in consideration of which the concessions had been made and which must have been performed before Spain was bound to perfect the titles.—That a Spanish concession carrying on the face of it a condition the performance of which is the consideration for the ultimate perfect title is void unless the condition has been performed in the time prescribed by the ordinances of Spain, was determined by this court after the most mature consideration, in the case of the United States *vs.* Kingsley, 12 Peters 476 to 479 which is the leading decision upon the imperfect titles called Mill Grants, and which has been followed by all others coming within the principles, there, with so much accuracy, laid down."

The concession to Mrs. Wiggins, said Mr. Justice Catron, carrying with it the conditions *incident to settlement rights,* by the ordinances and usages of Spain, a brief notice in addition to what has already been said will be taken of the regulations and ordinances, and after referring to the treaty and to an ordinance published by Governor Coppinger of East Florida, on the 25th of November, 1818. 2 White's New, Rec. 282, 282. The United States *vs.* Kingsley, 1 Peters, 481, he proceeds: "From the ordinance it appears that concessions made to foreigners for large or small portions of land, conveying their documents with them (which shall be certificates issued by the Secretary) without having cultivated or even seen the country granted to them, such concessions are of *no value or effect,* and should be considered as not made, because the abandonment has been voluntary, and that they have failed in complying with the conditions prescribed for the encouragement of population," and therefore there is no reason why they should not revert to the class of public lands making *null* titles of cession which were made to them.

This is an adjudication of one of the highest tribunals, Executive, Legislative and Judicial, of the Government under which these grants were made,—one posesssing ample power over, and master of the subject, and has been followed by the highest judicial tribunal of our Country in the case which we have just now cited. In that case the court, after a most full and thorough investigation and discus-

sion of the merits of the claim of the appellee, concluded by saying: "Ten years had been the time required for cultivation and occupation; this rule was not rigidly adhered to, but the titles were perfected in some instance where valuable improvements had been made, and the occupation had been short of ten years, the Governor taking into consideration the disturbed state of the country.—These exceptions were abatements of the general rule requiring *ten years* cultivation and occupation. As Mrs. Wiggins *never cultivated* or *occupied* the land claimed, she took no *interest* under the rule, or *any exception* made to it, and it is free from doubt that had Spain continued to govern the country *no title* could have been made to her, nor can any be claimed of the United States as successors to the rights of Spain."

We have availed ourselves very fully of this case because it was most thoroughly and elaborately discussed and examined; is a leading case as to this class of grants, and is we think a direct authority as to the concession under consideration. The decree in that case was made upon a concession which in all its essential features is precisely analogous to that of Rocheblave. It is in point too, upon the position assumed, that exceptions in the practice of the Spanish authorities as to particular grants, did not establish a rule for others, and is, we think, upon the whole decisive of this case upon the points we have been discussing. The concession to Rocheblave was made with express reference to Morales' regulations which bear date 17th July, 1799. See 2 White's New Rec., 244.

The Fiscal in his opinion said "your Excellency may if you think proper grant him the tract of land of 800 arpens in the spot he designates *remaining subject to the conditions prescribed in the regulations of 17th July,* 1799;" evidently referring to those of Morales there being no other of that date. The only difference therefore between the two concessions appears to be, that the grant to Mrs. Wiggins was to be void and held as though not made, if she did not appear to take possession and cultivate within the term of *six months* and Rocheblave was "obliged to clear and put in cultivation in the precise term of *Three Years,* all the front of his concession of the depth of at least two arpens on the penalty of having the lands granted *remitted to the domain* if this condition was not complied with." We have seen the effect of her non compliance, viz: that she took *no title* under her concession. He did not comply and the lands granted to him were *remitted* by operation of law, *to the public domain.*

But there was another condition or requirement in the concession to Rocheblave to be complied with, before the grantee could claim an absolute or real title. The concession itself upon its face required that the lands, the 800 arpens, should be measured and marked out by the surveyor, to be *submitted to the Superior Authority,* the same it is presumed of which the witness Mr. Caro speaks when he says, "that at the time this grant is dated there was no Intendant, but there was one at Havana who ratified and confirmed two grants made by Macot," from which it is (we think) fairly to be inferred that after the survey and demarkation was made the whole matter was to be *submitted to the superior authority,* for its sanction, and every one at all acquainted with the practice of the Spanish provincial governments in relation to these matters is aware that it was the business of the grantee to see that his survey was made and to pay the "*costs to be taxed,*" and generally they were pretty heavy. Hence the reason probably why so many tracts remained unsurveyed. The surveys were made by the public surveyors, but it was the duty of the grantee to attend and point out the lands he had selected, and if such were not the general rule, it is the one that seems to have been prescribed by Masot in this case, and the concession being so vague the survey and demarkation was necessary to sever *these lands* from the public domain, as that was not done, they remained a part of it and were at the cession transferred to the United States. This is shewn by the case of the United States *vs.* Forbes, 15 Peters 178, 183, and the United States *vs.* Miranda, 16 Peters, 160, where the case of Forbes is cited and commented on. Forbes in his petition for the land after describing it said "the survey of which I will produce as soon as the tranquility of the province enables me," &c.

And in adjudicating upon that grant the Supreme Court of the United States laid much stress upon the circumstances that he had failed to do so. The concession or grant (for these terms as used in regard to Spanish titles in Florida are synonymous) to John Forbes said the court, was for 10,000 acres in the district or bank of the river Nassau, with an order that the concession should serve him as "*a title in form,*" and it was the duty of the party, said the Governor in the concession, to produce the plat and demarkation in the proper time. This is no more than the order in the concession to Rocheblave. No survey of the land granted was ever made in Forbes' case. "The duty imposed upon him (say the court) to produce the plat and demarkation in the proper time was never per-

formed." This grant was *rejected* because it calls were two *indefinite;* a difficulty which the survey and demarkation would have avoided. In the case of the United States *vs.* Miranda (before referred to) 16 Peters, 160, the court say: "Courts of justice can only adjudge what has been granted, and declare that the lands granted by the lawful authorities of Spain are separated from the public domain. The grant now sought to be confirmed (said the court) was not so *separated by survey,* or any such *distinctive call,* as will admit of survey." And here it may not be amiss to remark that the words, shall serve him as "a title in form" in the grant to Forbes are at least equivalent to the word "hereby" in the concession to Rocheblave, which it is insisted conveyed "a consummate title," yet they were not understood by the Supreme Court as conveying any thing more than the incipient title, nor were they considered as relieving Forbes from the duty and necessity of procuring and submitting the survey.

The Court in the case of Miranda refer to the undertaking of Forbes above mentioned to produce a plat and demarkations and his failure to do so, and say, "this was a condition he assumed upon himself. The execution and return of the survey could only *sever* the land granted from the public domain. No particular land having been severed from the public domain by John Forbes his was the familiar case of one having a claim to a large section of country unlocated, &c. In such a case the government has ever been deemed to hold the fee unaffected by a vested equitable interest, until the location was made according to the law of the particular country."

In grants of land with uncertain designations, to be made in a large district of country they must have been *severed from the public domain* by a survey, or be void for want of identity. The same doctrine was held in the case of the United States *vs.* O'Hara, 15 Peters 275. The United States *vs.* Delespine, 15 Peters, 317.—Buyck *vs.* the United States, 15 Peters, 215, and the United States *vs.* Lawton et al., 5 Howard's S. C. Peps. 10.

Indeed the settled doctrine of the Supreme Court of the United States in respect to these Florida grants is, that grants of land embracing a wide extent of country, or within a large area of natural or artificial boundaries and which lands were not surveyed before the 24th of January 1818, and which are *without such designation as will give a place of beginning for a survey,* are *not* lands withdrawn

from the mass of vacant lands ceded to the United States in the Floridas, "and are *void* as well on *that account* as for being so uncertain that locality cannot be given to them." The United States *vs.* Miranda, 16 Peters, 160, 161.

The court most fully concurs with the Supreme Court of the United States in that opinion and considers this grant as it presents itself for their consideration, as one of that description. Rocheblave in his petition to the Governor for the land says "being desirous to make an establishment, and knowing that the tract of land commonly known by the point of the Flag Staff is vacant, &c. Here then is the description, "the tract of land commonly known by the Flag Staff." The surveyor in his report speaks of it as "the tract of land at the point of the Flag Staff." Neither of these descriptions convey any very definite idea or fix any definite point for the commencement of a survey. It seems quite probable from the description of the tract given by the grantee and they surveyor, that it had obtained the name of "the tract of land by or at the point of the Flag Staff." But what was the extent of the tract whether only 800, or whether 8000, or 8,000,000 arpens, or how it was situated, what were its boundaries, whether there was ever a flag staff upon it, or in the region of it or not, or whether there is or is not any specific starting point for a survey upon it or not, is not shewn by the grant itself, nor do the pleadings or evidence in the record inform us. It must be borne in mind that this is an action of ejectment in which the plaintiff's if they recover at all, must recover upon the strength of their own title, and not upon the weakness of that of the detendant. Runnington on ejectment, page 15. McHenry on Ejectment, page 115. Tillinghast's Adams on Ejectment, page 32.—Hodsden *vs.* Staple, 2 Term Rep., 684. Doe on the Demise of Crowe *vs.* Boldware 5 Term Rep. 110. Doe on the Demise of Haldane and Urry *vs.* Harvey, 4 Burrows Rep. 2487. Walker *vs.* Carlter. Addison's Rep., 390. 1 Smith's Leading Cases, 152.—2 Greenleaf's Evidence, page 266, Sec. 231. The plaintiffs must shew a paramount legal title in themselves or they cannnot recover. Swayze and wife *vs* Burke, 12 Peters, 12, 23.

And the defendant may set up an outstanding title in a third person as a defence, Lane *vs.* Simms Lessee, 9 Wheaton's Reps., 515. Runnington on Ejectment, 15. McHenry on Ejectment, 115.

All concessions or *incipient* Spanish grants were made without injury to a third persons. Sometimes it was so expressed in the con-

cessions, but if it was not so expressed the exception was implied by law. In the case of the United States vs. Heirs of F. M. Arrendondo and others, 13 Peters, 134, the court says. "If upon the survey it shall be found to interfere with previous grants to third parties the concession must be lessened in quantity according to the extent of the rights of such third parties."

Suppose then that this grant had been permitted to go to the jury as evidence of title and the lands called for by it, had been covered by older valid grants, it is not perceived how the defendant could have availed himself of that fact in his defence. It would seem that his right to do so would have been defeated by the vagueness of this concession; a reason sufficient of itself for its exclusion.

It is alleged, however, on behalf of the plaintiff, that this grant "might have been made sufficiently certain by other evidence, if the rejected evidence had gone to the jury as a foundation."

It is also insisted that the objection that, "there was no evidence of a compliance with the regulations of Morales," is a question "that does not arise upon the exceptions, but was a question for the jury."

This, however, as the matter is presented to us, we think a misapprehension. It would have been a question for the jury had evidence of such compliance been given in the court below. But this court cannot intend that there was any other evidence than that stated in the bill, and every bill must be considered as presenting a distinct case, which if defective in any material point, cannot be supplied by intendment. Dunlap vs. Monroe, 7 Cranch, 270.

If parol evidence to explain a deed be excepted to, the bill must state the evidence, so that the court above can decide whether it was admissible or not. Gateman *vs.* Burrows, 3 Call, 194. (King vs. Kenny, 4 Ham. 79. McDougal vs. Flemming, Ibid, 388. I United States Digest, 415, No. 96.) The court will not presume facts that do not appear on the bill. Jackson *vs.* Bellow, 2 Porter's Rep. 29. Cravens *vs.* Grant. 4 Monr., 126. Where parol evidence is excluded which might be proper when connected with a record, the bill of exceptions should state that such record was offered, otherwise it will be presumed that the parol evidence alone was offered. McDowell *vs.* Curwell, 4 Rand., 317.

In this case the concession being excluded, which according to the position assumed, might have been proper with parol evidence to show a compliance with the conditions prescribed by Morales' regu-

lations, and to define the location (if it could be defined,) the bill of exceptions should have shewn that such evidence was given or offered to be given. And where evidence not admissible in itself, but which might have become so by being connected with other evidence, is rejected by the court, and a bill of exceptions filed, the bill ought to state that such other evidence was offered, otherwise it will not be presumed. Courtenay *vs.* Commonwealth, 5 Rand., 666.

In this case it is not pretended that the grant was in itself evidence but that it was offered as a link in the chain. It ought therefore to have been shewn by the bill of exceptions that the evidence to supply the other links in the chain was offered. There is no difference (in effect) between a statement in a bill of exceptions, that certain facts were proved, and that evidence was offered of them. Reggin *vs.* Petapsco In. Co., 7 Harr. and John., 279.

The regulations of Morales which profess to be made, "That all persons who wish to obtain lands may know how to ask for them, and on what *conditions* lands can be granted," 2 White's New Rec., 234, go on to provide, Art. 15, page 238, that all concessions shall be given in the name of the King by the General Intendant of the Province, and directs that a survey shall be made, &c. And a *process verbal,* specifying the manner, &c. And in article 16 directs that the *process verbal* with a certified copy of the same shall be sent to the *Intendant* to the end that on the orignal there be delivered by the consent of the King's Attorney General, *the necessary title paper,* to which was to be annexed the certified copy of the process verbal. And if nothing further appeared this itself would shew that until all this was done, the right of the grantee was *inchoate* and *imperfect,* and that the legal title remained in the Government.

But in article 18, Morales says: "Experience proves that a great number of those who have asked for lands, think themselves the legal owners of it; those who have obtained the first decree by which the surveyor is ordered to measure and put them in possession, others after the survey has been made, have neglected to ask the *title of the property,* and such like abuses continuing for a longer time will augment the confusion and disorder which necessarily results.

"We declare that no one of those who have obtained the said decrees notwithstanding, in virtue of them the survey has taken place, and that they have been put in possession, *can be regarded as owners of the land,* until their *real titles* are delivered completed

with all the formalities before recited." Rocheblave had no survey, and never so far as the record shews, was ever put in possession of these lands. It is very evident, therefore, that under the Spanish Government he was not the owner of this tract of land, and we are not aware of any principle by which his right to it can have acquired any additional strength by the cession and transfer of the Floridas to the United States.

We are therefore clearly of the opinion that this concession is not evidence of title, and that it was properly ruled out by the Court below.

Hitherto we have said nothing in regard to the power of Governor Masot to make these incipient grants of land. It was not necessary to the decision of this case that we should question his general power to do so. But it may not be improper for us to remark that if this grant is to be understood (as the counsel for the claimants seem to understand it,) as embracing the land on which the flag stood, and that was a flag staff used by the Government for Naval, Military or Commercial purposes, we do most strongly question whether the making it by Governor Masot would ever have been sanctioned by the superior authorities to whom the survey and the *process verbal* were (as we have seen) to be submitted and from whom the *title paper* was to come.

Upon full and careful examination of this case, we are of opinion that there is no error in the record and proceedings of the Court below and the judgment is therefore affirmed.

Per Totam Curiam.

ADMINISTRATOR AND ADMINISTRATRIX OF JOHN SMITH *vs.* JOHN C. POYTHRESS AND OTHERS.

Where notes had been given by a husband for materials and merchandise, used and employed for the benefit of the separate estate of his wife, and for her support and maintenance, and judgments had been recovered on the notes against the husband, and executions had been returned "no property found." Held, on bill filed for that purpose by these judgment creditors, that the separate estate of the wife was liable in equity for the payment of these claims.

Had the husband paid these demands, he would have been entitled to be re-imbursed out of the separate estate, and the creditors are entitled in equity to the same equity, the husband being insolvent.

APPEAL from Jackson Circuit Court.

Woodward, for Appellants.

Yonge, for Appellees.

LANCASTER, Justice.

This case comes from Jackson Circuit Court, and is a Bill in Chancery of the administrator and administratrix of John Smith, deceased, to make the settled, separate estate of Mary E. Cheeseborough, wife of William B. Cheeseborough, liable for the payment of debts contracted by William B. Cheeseborough, who was acting agent on said estate for his said wife, for supply and improvement of said estate, and which contracts were for the comfort, accommodation, and advantage of his wife, the said Mary E. Cheeseborough, and made with her assent and sanction. The debts were contracted, one with John R. Chapman, for lumber and plank appropriated in the erection of a dwelling house, carriage house, negro houses, gin house, stables, &c., on the said separate estate of his said wife, amounting to the sum of $647 69-100; and another for goods, wares, and merchandise for the benefit of his said wife, the said Mary, and for the support and maintenance of her said separate estate, with one Washington Chapman for the sum of $126 11-100. William B. Cheeseborough gave his separate notes for these two demands, which came regularly to the intestate of the complainants by assignment. Suits were brought upon them, judgment obtainerd, execu-

tion issued against the said Wm. B. Cheeseborough, and a return had thereon of "no property found."

To this bill the defendants demurred and allege as ground of demurrer want of equity in the bill; that, admitting the facts in the bill as true, the parties had taken Mr. Wm. B. Cheeseborough's notes in payment, upon which suit had been brought; that, having contracted with the agent, and given him credit, they cannot hold the principal bound.

It is alleged in the bill that the lumber bought of John R. Chapman was applied in the construction of a dwelling and other houses on the trust estate, and enhanced its comfort and permanent value; that the goods bought were for the support and maintenance of said estate; that the supplies were furnished with the assent and sanction of the *cestui que trust*. It may be true in general, in commercial transactions, that where one deals with the trusts the agent, he cannot hold the principal bound. But where an estate depends on equity for its existence it should do equity.

In this case, the *cestui que trust* knows of these contracts, when made assents to and sanctions them. Her trust estate has the advantage of the one in permanent improvements and repairs, in the other of support and subsistence. She herself has the benefit of the services of her husband, who is insolvent, by appropriating his whole time and attention to her business. She is rich—he is worth nothing. She receives and enjoys the benefits of these contracts, and is now willing to evade their responsibility. Permits her husband (who she knows to be insolvent) to liquidate these demands with his own notes, and coolly says to the complainants you have elected the agent as your debtor, make what you can out of him. To tolerate such a proceeding would (it seems to the Court) assist husband and wife in cases where she has a separate estate to defraud and deceive. Let it not be said, that because the husband is bound for the support and maintenance of the wife, therefore such contracts are made by him properly for that purpose, and her estate is not responsible for them. Howsoever true it may be that the husband is bound to support and maintain his wife as a general rule, cases like the present will, as they must, form exceptions; but in any event, they can furnish no ground to justify or defend fraud. A poor husband is not bound to support his rich wife by cheating his neighbor, and she will not be permitted to aid in the deception, enjoy and thrive by the fruits of it, and disclaim all liability. If the husband had been able.

and paid these demands, he would in equity be entitled to have them refunded to him from the proceeds and profits of the wife's equitable estate. 7th Paige, Ch. R., 13.

With equal equity the complainants may set up the same demand against the same estate. The property was bought for the trust estate, is mainly in permanent fixtures on it, and has not been paid for. Cater *vs.* Eveleigh, 4 Des. So. Ca. E. R. 20, and 1 McCord C. R. 369.

It is therefore ordered, adjudged, and decreed by the Court, that the appeal be sustained, the judgment and decree below be reversed, the demurrer be overruled, and that the Appellees answer the bill in the Court below.

JAMES M. GILCHRIST, JUDGE, &C., *vs.* OSCAR FILYAU AND WIFE.

An action of debt cannot be sustained in this State against the heir upon the bond of the ancestor although the heir be expressly named.

Error to Gadsden Circuit Court.

This was an action of debt against Filyau and his wife, the latter being heir at law of W. D. Harrison, who had become security on the guardian bond of R. L. Harrison, guardian of Edward Mashburn, a minor. The plaintiff alleged as a breach of condition of the bond, that Robert L. Harrison, the guardian, had been removed from the office, and had failed to pay over and deliver to his successor the moneys and property received by him as guardian, &c. Defendants pleaded "*non damnificatus,*" and plaintiff demurred. The Court overruled the demurrer and gave judgment for defendants.

To reverse this judgment, the plaintiff took a writ of error, and assigned for error in this Court—"that the Court below erred in overruling the demurrer of the plaintiff to the plea of the defendants."

Thompson, for Plaintiff in Error.

Carmack, for Defendant in Error.

HAWKINS, Justice:

The pleadings in the this case raise the question, can an action of debt be sustained in this State by a creditor against the heir, upon the bond of his ancestor, the heir being expressly named.

If the solution of this question is to depend solely on the common law of England without reference to our statutes, the response would clearly be in the affirmative, for the principle is too well defined and settled to require comment or the sanction of authority. By that law the obligee of a bond could sue the heir, if expressly named, or the executor at his election, and have execution of the land descended to the heir, and this action being allowed against the heir no benefit could accrue to the obligee, unless he had execution of the lands descended to the heir. If the heir was not named in the bond he was not chargeable "for by the common law only the goods and chattels of the debtor, and the annual profits of the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative or executor, as well as in the hands of the debtor himself, and hence it was, that the executor was bound to answer the debt of the testator so far as he had chattels or essets, though he was not named in the contract; but the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, and therefore the land not being originally liable to the demand in the hands of the obligor, must be much less in the hands of the heir, who was not comprehended in the contract." 3 Bacon's Ab., 458-9, (F.)

In England if a man died seized in fee, the descent goes to his eldest son, and the lands are not assets in the hands of the administrator for the payment of debts. By the laws of Florida there is no such thing as primogeniture, the lands descends in parcenary, and is expressly declared assets in the hands of the administrator or executor, and after the exhaustion of the personal assets may be sold to pay debts due by the estate, besides being liable with personal property to an execution existing upon any judgment against such executor or administrator. Thompson's Digest, 202, 203.

Here we see all distinctions known to the English law between the real and personal estate, as to their being assets in the hands of

the executor or administrator entirely done away, subject to some modifications to be noticed hereafter. This distinction being once established, the same rights, duties, and liabilities, as to both would seem to be the necessary result and consequence. We will proceed further and point out some other of the alterations of the common law as created by our statutes. With us bond debts are of no higher dignity than simple contract debts. "All promissory notes and other instruments of writing, not under seal, being declared to have the same force and effect, as bonds and instruments under seal." Thomp. Digest, 331.

By the law of England the title to the personal property, of the intestate devolves upon the administrator, and he can sue for, and recover it against the heir, the law throwing the duty upon him of paying the debts, the personal property being assets for that purpose. The statutes of Florida give a more general and comprehensive power to the executor or administrator by extending and enlarging the fund with which the debts are to be paid. The statute of 1841, declares that, "it shall be lawful for any administrator of any deceased intestate or the executor of any deceased testator who has not power by the will of the testator, to sell real estate for the purpose of paying debts, or to make more equal distribution among the heirs, devisees, or legatees, to file a petition in the Circuit Court of the county in which letters of Administration or letters testamentary, have been granted, setting forth that the personal estate of his interestate or testator, (as he case may be,) is not sufficient for the payment of the debts of such intestate or testator, or that the real estate of such testator or intestate cannot be equally, fairly, and beneficially, divided among the heirs or devisees of such intestate or testator, without the sale of the real estate," &c. The statute then points out what proceedings shall be had upon his petition before a sale of the real estate is ordered or decreed by the court.

The law of 1833 (Thompson's Dig. 202) declares that "real estate shall be considered assets in the hands of the executor or administrator, and after the personal assets are exhausted may be sold under an order or decree of the Judge of Probate or officer discharging the functions of Ordinary or Judge of Probate. It is provided in this statute that no sale of real estate shall be made to any greater extent, than shall be necessary to supply the deficinecy of personal assets for the payment of the just and lawful debts of the deceased.

We cannot see as contended, that the act of 1833 is repealed by the act of 1841 further than changing the mode by which the executor or administrator is enabled to sell the real estate for the payment of debts where there is a deficiency of personal assets. On the contrary we think the law of 1841 is a virtual affirmance of that part of the law of 1833 which asserts that the lands shall be assets, and we think that its provisions are even more extensive by enabling the administrator or executor to sell real estate to make *more equal distribution* among the heirs or devisees.

The object of the law of 1841 is clearly to guard more effectually the rights of the heirs by presribing a process better calculated to produce the result than had existed by the law of 1833. The Judge of the Circuit Court is substituted in lieu of the Judge of Probate, and an issue is created for the purpose of better ascertaining the necessity of a sale of the real estate, and by making all persons interested in the lands parties to the issue their rights are necessarily more cautiously guarded. With these views we must consider the acts of 1833 and 1841 *in pari materia* and the former only so far repealed as conflicts with the latter upon the principle of *leges posterioris prioris abrogant.*

By our statute of descent it is declared whenever any person having title to real estate of inheritance, shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred. Thomp. Dig. 188. The rule of the common law in relation to descents is thereby clearly abrogated and annulled, and we have already seen that it is in direct conflict with our statues. Although by our statutes of descents the fee is clearly in the heir so that the inheritance may remain unbroken yet it is so cast upon him subject to the debts of the intestate and I might add the dower of the widow. If the lands are assets they must carry with them the incidents of assets, and when the law declares them to be such the power to render them available necessarily follows as an incident.

The rents and profits of the lands constitute a fund for the payment of creditors, and as they must be our laws look to the executor or administrator for payment of their demands how could that fund be made available unless the estate from which it springs be rendered amenable for the debts? And the law points out the mode by which it is to be accomplished. The rents and profits are incident to the land, and it is obvious that the law intended that the whole estate should be subject to the payment of debts.

James M. Gilchrist, Judge, &c., vs. Oscar Filyau and Wife.

By the sixth section of the law of 1828, it is enacted that "all debts and demands of *whatsoever nature* against the estate of any testator or intestate, not exhibited within the said two years, (that is, from the time of granting the letters testamentary or letter of administration,) shall forever afterwards be barred." To this is appended a proviso, that the executor or administrator shall make advertisement for four weeks, giving "notice to all creditors, legatees, and persons entitled to distribution, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same—saving, however, to married women, infants, persons of unsound mind, imprisoned, or beyond the limits of the United States, in the military or naval service thereof during war, the said term of two years after their respective disabilities shall be removed, to exhibit their respective demands to *said executors* or administrators." Thomp. Dig., 206, sec. 6.

This statute, like all statutes of limitation, must be regarded as one of repose and specifying a period after which litigation shall cease. Its terms embrace *"all debts and demands of whatsoever nature,"* specially or otherwise, and we have already seen that bond and simple contracts are placed upon the same footing.

It is asked, how by any possibility can this statute have the operation intended, if a bond creditor were permitted to come forward after the lapse of time embraced in the statute for the presentment of demands, and still render the lands liable in the hands of the heir. If so, the intention of the law would be frustrated, and it would cease to be a statute of limitations.

It may be said that the saving clause in it, allowing two years for the exhibition of demands after the removal of disabilities which might exist as to *feme coverts*, infants and others, would have the effect of prolonging the settlement of estates, and thereby defeat the object of the statute. Not so—because the law declares that no legacy or distribution shall be required of any executor or administrator until the expiration of six months from the taking out letters, &c., nor shall the executors or administrators be compelled to pay legacies or make distribution until bond and security be given by the person entitled to the same, to refund a due proportion of any debts or demands which may afterwards appear against the estate, and all cost which may be awarded on the same.

The Executor or Administrator if he has availed himself of

the security provided by law in his behalf may have recourse to it for the payment of the debts or demands presented, or at least regard it as a means of reimbursing himself in case he pays the debt or demand. The bond and security may be regarded as a substitute for the fund parted with in the way of legacy or distribution, and are expressly provided for the *refunding a due proportion of any debt or demand which may afterwards appear against the estate.* If the land distributed could be followed in the hands of the heir, such a permission would be superfluous, and we think it clear, that the demand must be made to the executor or administrator.

Pursuing the propositions of counsel, suppose the present action maintainable, the result would be that the specialty creditor would obtain an undue advantage over the simple contract creditor, he being obliged to bring his action against the executor, and we have seen that our law places them upon the same footing in every respect. Besides it would be equally injurious to the heir, for by the law of England if he pays off the bond debt creditors to the value of the land, he may plead such payment against subsequent suits and then retain the land, but by our laws it would still be subject to the simple contract creditor as assets in the hands of the executor.

If the common law remedy against the heir is restored by the act of 1841, and the lands are not assets in the lands of the administrator or executor, the remedy of the simple contract creditor is lost against the land, which would go to the heir discharged of the simple contract debts, and the order of the payment of debts as prescribed by our statute would be done away and abolished.—Thomp. Dig. 205, Sec. 2.

It cannot be said we think, that owing to the views we have taken the remedies of the bond creitors are affected, because he is compelled to sue the administrator or executor, for inasmuch as lands are assets by our law in their hands, so long as there are any, subject to the debts of the testator or intestate, the plea of *plene administravit* could not be pleaded, and if it was so pleaded, it could be rebutted by showing that there were lands of which the testator or intestate died seized, which might be the subject of sale. Lands may be deemed assets *sub modo*, or conditional assets as contended for, but still they come within the purview of the term assets, which is defined to be property in the hands of the administrator or executor, that is sufficient to make him chargeable to a creditor, legatee or

party in distribution so far as such property extends. Williams on Executors, 1011.

It is clearly the duty of the executor or administrator, in case there should be a failure of personal assets, to make application for the sale of lands in the mode pointed out by law. It is not a matter with him of mere discetion. The power given is one to be exercised, and if not so exercised the plea of *plene administravit* cannot avail him, and upon a proper case made out before the Circuit Court it equally has no discretion to refuse the order or decree of sale.

We find a case in the first volume of Stewarts Alabama Reports strongly in point with the case at bar. In that case there had been judgment rendered against the administrator, and it was decided that lands descended could not by *scire facias* against the heirs, be made liable to execution. The Chief Justice who delivered the opinion of the Court remarks "In England, if a judgment had been recovered against the ancestor, the lands which were liable to execution in his lifetime may be made liable after his death by *scire facias* against the heirs and *terre tenants*. Our Statute of 1812 gives to judgments and decrees a lien on lands, tenements, &c., and directs that the clerk shall frame the execution accordingly. But for debts, &c., for which judgment has not been obtained against the ancestor, the lands cannot be made liable to execution by judgment against the personal representative. Our statutes have pointed out another mode for subjecting the lands to the payment of debts. If the personal estate be insufficient the executor or administrator shall make his report accordingly, and the land shall be sold by order of the Court. This course does not abridge the rights of creditors, for as the administrator cannot have fully administered if on a deficiency of personal estate he fails to make his report as required so that the lands may be resorted to, the remedy is more ample that at common law." The statute here alluded to by the Court is one precisely like that of 1841 with the exception that in Florida the Judge of the Circuit Court is substituted for the Judge of Probate. Indeed we believe our statute is copied from the Alabama statute, and here is a direct adjudication upon it, sustaining us in the views we have taken.

Deeming upon a due consideration of the subject, that the common law remedy in favor of the bond creditor against the heir is annulled by our statutes, we are of opinion that the judgment of the Court below should be affirmed. *Per Curiam.*

BRADFORD, EXECUTOR, OF READ, ET AL., *vs.* MARVIN & MARTIN.

A cause in Chancery cannot be brought to this court by *Writ of Error.*

Error to St. John's Circuit Court.

Motion to dismiss the writ on the ground that the cause (being in Chancery) may be brought to this court by appeal only.

Forward & Fairbanks, for the Motion.

J. & L. Branch, Contra.

BALTZELL, Justice:

This case is brought here by writ of error, and a motion is made to dismiss it on the ground that a case in Chancery may be brought to this court by appeal only.

By the common law, a suit at law, after judgment, may be removed by writ of error only to this court, whilst by the practice in cases in Chancery obtaining according to the course of the civil law, an appeal is the appropriate remedy for removing a suit in Chancery after Decree. Ward *vs.* Gregory, 7 Peters, 453. The statute law has so far made an alteration as to allow Appeals in common law cases, but we are not aware of any provision extending the writ of error to cases in Chancery. The statute in reference to Appeals and writs of error declared that "the writ of error shall issue as a matter of right," obviously leaving the writ as it then was by law and making a reference necessary to the common law to determine the character of the cases to which it was applicable. Other clauses of the statute support the conclusion that the writ was considered as inapplicable to cases in Chancery, thus the form of the bond in case of supersedeas is for "the due prosecution of the suit *in error;* and in case of the affirmance of the judgment, to pay the defendant in error the condemnation and costs." The tenth section provides that "writs of error on judgment in civil actions shall be sued out within two years from the date of said judgments."

This view is still further confirmed by the act of 11th February, 1832, entitled an act to amend an act to regulate proceedings in Chancery, which declares that a party plaintiff or defendant may

appeal from a decree at any time within two years, and for a supersedeas upon an order of one of the judges, thus extending the former law providing that appeal should be taken in term time, or within ten days thereafter. Duval, 108, 138.

We are then of opinion that the writ of error may not be used as a process to remove a case in chancery to this court, and for this reason the writ must be dismissed.

FLINT RIVER STEAM BOAT COMPANY, *vs.* ROBERTS, ALLEN & CO.

Where judgment had been rendered under the peculiar provisions of the second section of an act of the General Assembly approved January 4, 1847, entitled "An act given a lien to steam boat men and others navigating the Bay and River of Apalachicola," upon the affidavit of the plaintiff, without notice to the defendants or appearance by them and without any declaration filed or assessment of damages by a jury:—Held that such judgment must be reversed notwithstanding the statute does not expressly require either a summons, appearance by or notice to defendant, or a declaration or a jury trial.

Where consequences in violation of common reason, common right and the principles of common justice arise even collaterally out of a statute, it is void protanto.

The statute above referred to is in violation of the declaration of our Constitution, "that the right of trial by jury shall forever remain inviolate," and is null and void.

Writ of Error to Franklin Circuit Court.

The facts of the case precede the opinion delivered by the Chief Justice.

W. G. Davis, for plaintiff in error, contended:

That the Judge who granted the order on which the judgment was entered, did not possess any right to exercise jurisdiction as a Judge of the Circuit Court, in the county of Franklin, on the day on which he made the order. The Constitution has given power to the Legislature to pass laws *requiring* the Judges to *alternate*. The power so given has been exercised by the Legislature by act, which

if adhered to compels them to *preside* in turn, in each and every Circuit of the State. The act not only affirmatively requires them to officiate as the Judge of each Circuit once in two years, but expressly negatives the exercise of judicial functions by the same judge in the same Circuit oftener than once in two years.—The terms used *"shall not preside,"* are broad and comprehensive. In the present case the Judge of the Middle Circuit, according to these views, had no right under the alternating system to preside in Franklin at the time he gave the order for judgment.

The affidavit on which the order was issued was made by an agent, and this constitutes another ground for reversal. The statute being adverse to the common law, every person seeking the benefit of its provisions should be held to pursue the strict letter of the act.

The next and last objection to which I will ask the attention of the court is that the law itself is *unconstitutional.*

It is unconstitutional inasmuch as it infringes that provision of the Constitution of the U. States which provides that "in trials at common law where the amount in controversy exceeds twenty dollars the right of trial by jury shall remain inviolate." The amount in controversy exceeded twenty dollars and the remedy for the recovery of the demand necessarily must be by the course of the common law. In other words the subject matter of the controversy was within common law jurisdiction.

Such being the nature of the right to be enforced, it only remains to enquire whether the remedy provided by the Legislature, and under which the proceedings were had, does or not preserve the right of trial by jury *inviolate.*

The act authorizes the party claiming against a boat for supplies —to have judgment by *an ex* parte demand supported by affidavit.—There is no trial at all either by jury or otherwise—nor has the party an opportunity of being heard in his defense. The proceedings under the statute are similar to those by the civil law where a party is condemned for *contumacy* for not appearing after summons, &c. The difference in the proceedings are that in the cases under the statute no summons of any kind is served. Now it must be evident that where the party is condemned to pay a demand by an ex parte proceeding, the right of trial by jury is altogether unavailable to him. The remedy provided by which the defendant may have the judgment opened it is true, does secure a

jury trial, but it prescribes terms and conditions hard to be complied with, unusual in the course of the common law, and calculated to hinder and prevent a defendant from obtaining the benefit of a jury trial.

The law requires that the defendant shall do all that a defendant in Equity is required to do, that he shall by affidavit admit or deny the whole debt or some part, and if a part is admitted that such part shall be paid ere he be permitted to contest the remainder, and that he shall give bond to respond to the final judgment. Now it may happen that the owner of a boat is unacquainted with the facts relating to the demands, and he may be scrupulous as to the denial of the validity of a demand of which he knows *nothing*. He may not be able to give security. It is evident that all the requisitions of the statute impose conditions unknown to the common law, and that they are calculated to render the attainment of the right of jury trial less easy and more difficult. Whatever delays, hinders or obstructs a party in the pursuit or enjoyment of a right, may be truly said to *violate* such right. In order to a correct determination of what was meant by the clause of the Constitution referred to, let us refer to the trial by jury as it existed at the time of its adoption, and such as we find it was at that time, such must it continue to be considered, and in order to obey the spirit of the Constitution must be preserved to the defendant undiminished and unaltered from its pristine state, when the Federal Government was created. In all cases where the Constitution refers to rights and remedies without specifically defining in what consists the particular right, or what is the nature of the remedy, it has been decided by the Supreme Court that reference must be had to the common law as it stood at the adoption of the Constitution, to determine any question that arises on such subject. Now it may be fairly argued that whenever the mode of proceeding in trials at common law is so altered as to postpone the trial by jury to a time subsequent to the rendition of the judgment and the seizure of the defendants property, that such a course of law, being entirely different and opposite to the common law method of proceeding, is a violation of the common law, and if a violation of the law which secures a right to a party, it is a violation of that right. Any law it has been determined by the Supreme Court of the United States, which, in prescribing the remedy on contracts, so acts as to obstruct the party in pursuit of his right to recover on a contract, and renders it "hardly

worth pursuing," is a law "violating the obligation of contracts." Now as a carollary to such proposition of constitutional law, may we not assert that a law which materially alters—varies the mode of trial by jury, and which imposes new, greater and hard conditions, as a pre-requisite to its enjoyment, *violates* the *right* which the Constitution declared should *remain forever inviolate*. Certainly the conclusion is fair and legitimate and the premises and the reasoning are analagous and parallel. The Legislature may alter so as to increase, but it *cannot* alter so as to diminish the right. Whenever in human affairs a right which an individual member of society is so interfered with as to hinder and obstruct him in the enjoyment of the benefits which flow from its uninterrupted possession, it is said to be *violated*. Whenever an object of art, a monument raised to commemorate the great deeds of some departed hero is shorn of its fair proportions by the rude hands of man, it is said to be violated. Such examples of the *acceptation among men* in which the word is used, are cited to sustain the positions assumed, that inasmuch as the act in question hinders and obstructs a man in the employment of the right of trial by jury, such as it was when the Constitution secured it to him, and whereas by the provisions of the act, such right has been marred in its beauty of form and "curtailed of its fair proportions," has been narrowed and confined in its limits, the act itself must be considered as operating to *violate* the right.

The law in question also violates that provision of the Constitution of the United States which declares that a citizen shall not be deprived of his property except by due course of law.

The meaning of the Constitution was that the property of a man should not be taken away except by the verdict of a jury and judgment of a court and after a trial by law. It was intended to prevent confiscation and seizures by arbitrary authority, or by private hands, under pretence of doing summary justice. It therefore provides that the *due course of law* shall be followed. It inhibits the passage of a law giving an extraordinary and particular remedy to a particular individual or to a particular class of men.

The *due course of law* meant was the course which was pursued at the time the Constitution was adopted, subject to such alterations and modifications (as might be effected by the Legislature,) not inconsistent with the true spirit of the *common law*, the great original

head and source of all the law known to the Constitution, or meant to be defined by that instrument under the *nomen generalis*.—LAW.

I contend that the Constitution by the provision last quoted meant to prohibit the passage of a law to give any particular person or persons particular remedies by means of which they could obtain possession of the property of another, which proceeding should be different in its spirit and in its operation, from the usual and existing *"course of law,"* which should be required of other citizens, and contrary to that spirit and course of the *common law* designated by the terms employed in the section of the Constitution last quoted.

All particular and partial Legislation might be safely declared to be in violation of the spirit of the Constitution of our State, and that of the United States; but certainly such Legislation is so, which gives to one man or set of men rights not to be enjoyed by others, and rights which if enjoyed by all must be possessed and used at the expense of, and by means of, the curtailing of the rights of others. Such is the character of the act in question—it permits one set of men to proceed in a summary manner to enforce a right, whilst other men are held to the pursuit of their rights in the slow, yet steady, and sure method known to the common law, and derived from it, but simplified and perfected by the statutes of the State.

For all these reasons I contend that the act in question is unconstitutional, in violation of the express requirements of that instrument, and in violation ofthe spirit of it. To conform to the spirit of that Constitution the remedy should be analogous to the common law remedies. The tribunal which decides upon the right, should proceed acording to the distinguishing and characterizing forms, of common law courts. The party defendant should be summoned in person or by attachment of his property, and be allowed "a day in court," to be heard by himself or by attorney in his defence, he should have the right to examine the witnesses produced against him, and to produce witnesses in his own behalf, and the trial of the issues of fact should be submitted to a jury, and not decided by the Judge on the testimony of the plaintiff alone. Any other mode of proceeding (by means of which a man's property is seized, and taken out of his possession,) not being in accordance (substantially) with the requisites and characteristics before enumerated, is contrary to the spirit of the Constitution and foreign to our institutions of Government; unworthy to be practiced among a free people, where equality in all things is asserted as a fundamental principle of the

compact of Government, and in violation of the provision which requires the observance of all cases of the *"due course of law."*

Carmack & Baker for Defendants in Error.

In this case there are five grounds of Error assigned. We will notice them in detail:

1. It is alleged that the Judge of the Middle District granted the Fiat. And that it should have been granted by the Judge of the Western District.

To this we reply that the application may be made before "any Judge of the Circuit Court in any county in which said boat may lie." Act 1846, Thomp. Dig. 413, Sec. 2.

2. It is said that the *demand* of payment was made by an agent of plaintiff instead of the plaintiff in person and that the *affidavit* was made by an agent.

To this we reply—that having been done by an *agent,* they were in contemplation of law done by the *principal.*

3. It is alleged that there was no summons, or jury trial, or notice to the defendants, or declaration.

To this we reply that the act requires none and where the difficulty of knowing who the owners of steam boats are is considered, it would have been unreasonable in the Legislature to have required any notice to the defendants—none is required by the attachment law and none here.

The act does not require a declaration. If the defendants desire a jury trial—the act gives it to them upon their application to have it, and the act in the meantime arrests the proceedings under the Execution.

Instead of taking these proceedings in this case, the defendant waived it by giving a bond for the delivery of the boat on the day of sale.

4. The proceeding is contrary to the course of the Common Law.

To this we answer, this is no valid objection. All equity proceedings; Atachment laws; Tax sales; Admiralty cases, and summary proceedings generally, are contrary to the course of the Common Law.

5. The Record and proceedings are unconstitutional in this—they violated the 5th and 7th articles of the Constitution. See amendments.

To this we answer that these articles are intended solely as limitations on the exercise of power by the Government of the United States, and are not applicable to the legislation of the States. Baron *vs.* the Mayor and City Council of Baltimore, 7th Peters, 243. Livingston *vs.* the Mayor of New York, 8 Wend., 85. Colt *vs.* Eves, 12 Conn. 243.

So of the 6th amendment that secures to the accused a trial by jury in all criminal prosecutions. Murphy *vs.* People, 2 Con. 815.

But suppose that there is such a constitutional prohibition on the Legislature here as that contained in the 7th article of the Constitution of the United States. This act is not a violation of it, 8 Yerger, 444, Morford *vs.* Barnes.

DOUGLAS, Chief Justice:

This case came up by writ of error from a judgment rendered by a Judge of the Circuit Court at Chambers at Apalachicola, in Franklin county, on the fifth day of June, A. D. 1847, under the peculiar provisions of the second section of an act of the General Assembly of this State, "approved January 4th, 1847," Thompson's Digest, 414, which provides that "whenever any captain, pilot, engineer, first or second mate, fireman, deck hand, merchant, builder, material man, or any other person employed in, or for materials, goods, or supplies furnished any steamboat, lighter or other water craft navigating or running on the Apalachicola river, and bay of Apalachicola, shall have any claim for services rendered on board the same, or for provisions stores, or work and labor done, shall be desirous of collecting the same upon the said debt becoming due and refusal to pay the same upon demand made, he, she, or they may upon application to any judge of the Circuit Court in any county in which said steamboat, lighter or other water craft, may then lie, upon the same arriving at the landing, port, or place of destination to which the same had been freighted, make affidavit before the said Judge, of the amount due him, her, or them, for any labor, services or supplies by him, her or them, done and performed, or provisions or stores furnished said steamboat, or other water craft, and specify the name thereof. Whereupon the said Judge shall grant an order to the Clerk of the Circuit Court of the county where the proceedings shall have been commenced requiring said clerk to enter up judgment upon said affidavit in favor of said applicant for the amount sworn to be due; and it shall be the duty of said clerk to

issue instanter an execution therefor against the owner or owners of said steamboat, lighter, or other water craft, to be directed to the Sheriff of the County, whose duty it shall be forthwith to levy said execution upon the said steamboat, or other water craft, and advertise and sell the same under the same rules and regulations as govern Sheriff's sales in other cases. *Provided,* the said demand exceeds the sum of fifty dollars." (If said sum shall be for fifty dollars or less, then, and in that case the application shall be made to a Justice of the Peace, &c. Ibid.)

An affidavit was made before said Judge by Luther D. Roberts agent claiming for Roberts, Allen & Co., the sum of six hundred and fifty-seven 60-100 dollars, for iron work and material furnished said Flint River Steamboat Company, to and for the use of said steamboat. Whereupon the said Judge entered the following order: "At Chambers, June 5th, 1847, upon reading the foregoing petition and affidavit annexed, it is ordered that the Clerk of the Circuit Court of Franklin county, do enter up judgment in favor of Roberts, Allen & Co. in the sum of six hundred and fifty-seven 60-100 dollars, ($657 60-100,) amount sworn to against 'The Flint River Steamboat Company,' owners of steamboat Magnolia. In witness whereof I have hereunto set my hand this day and year above written." This order officially signed by said Judge, was on the same day presented by the plaintiff to the Clerk of the Circuit Court of Franklin County for the entry of judgment as therein prescribed, and in pursuance thereof the said clerk entered up judgment as follows, viz: "It is therefore considered by the court that the plaintiffs recover against the said defendants the sum of six hundred and fifty-seven dollars and sixty cents, together with their costs by them in this behalf expended." And upon the same day an execution issued on this judgment which was levied on the said steamboat Magnolia. The steamboat was replevied until the first Monday in December, 1847, that being the first regular sale day after the said steamboat was replevied as aforesaid.

The plaintiff has assigned five several errors but we will only consider the *third* which we deem decisive of the case, and which is as follows, to wit:

"There was no summons issued and served, nor was there any evidence to show that defendant had any notice of the institution of

this suit, nor was there any declaration filed, or any assessment of damages by a jury."

The defendants in error contend that the statute above quoted does not expressly require either a summons, appearance by, or notice to the defendant, declaration or a jury trial. This is true but the defendant must have notice either actual or constructive, or no valid judgment can be entered against him. Hollingsworth *vs.* Barbour *et al.*, 4 Peters, 470. Jones *vs.* Smith, 3 N. Hamp., 108. Hart *vs.* Huckins, 6 Mass. 399. Arnold *vs.* Tourtelot, 13 Pick., 172. Heathorn *vs.* Hulin, 3 J. J. Marshal, 432. Morris *vs.* Parker, 3 Littel, 368. Stayel *vs.* Westcott, 3 Day 349.

Statutes authorizing proceedings in derogation of the common law for the recovery of debts, generally provide specially, that notice of the institution thereof be given to the defendant. It has been said that our attachment law requires no notice. It is true that it requires no notice before the seizure of the property, but it expressly requires that notice of the institution of the suit shall be *personally* served upon the defendant, or *shall be published for three months* in some newspaper of the district, and if there be no newspaper, then a written advertisement in some public place. This notice by advertisement or writing is what the books call constructive notice, and our attachment law further provides that "the court upon satisfactory proof of the service of such notice, and upon the finding of a *jury* of inquest may award judgment. It also requires a declaration and other pleadings." Thompson's Digest, 359, No. 1. Duval's Comp., 388, Sec. 14. It also provides that no attachment shall issue until the party applying therefor, his agent, or attorney, shall enter into bond with at least two good and sufficient securities, payable to the defendants, in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out said attachment.—Thompson's Digest, 388, No. 4. Duval, 391, Sec. 10. Thus strictly guarded are the rights of defendants under our attachment law. The act upon which this proceeding is founded contains no such safeguards for the defendants, and does not therefore commend itself to favorable consideration. In this case it is not pretended that there was any actual notice, or indeed any other notice, but the advertisement of the sale of the steamboat by the Sheriff. It was suggested (though apparently not relied on,) that the defendant had notice by this advertisement, but this was after judgment and be-

sides is not notice to the defendant to appear and defend his rights, but is only notice to purchasers. Constructive notice can only exist in cases coming fairly within the provisions of the statutes authorizing courts to make orders of publication, and providing that the publication when made, shall authorize the courts to enter a judgment or decree. Hollingsworth *vs.* Barbour, *et al.*, 4 Peters Rep., 466. Chief Justice Marshal in the case of Meads *vs.* Deputy Marsh., &c., 1 Brock, 388, held that "it is a principle of natural justice which courts are never at liberty to dispense with unless under the mandate of positive law that 'no man shall be condemned unheard, or without an opportunity of being heard.'" The statute under which this proceeding was commenced contains no such mandate. Although it does not expressly require, it does not prohibit the giving of notice, and if it is so framed that notice cannot consistently with its requirements be given, it may well deserve consideration whether it is not null and void, as being against the plain and obvious principles of common right. In Falconer *vs.* Montgomery and others, 4 Dall. 233, the court said: "The plainest dictates of natural justice must prescribe to every tribunal the law, that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right, but it is the result of long experience, and of a wise attention to the feelings and disposition of human nature." And in the case of the Commonwealth *vs.* the inhabitants of Cambridge, 4 Mass., 627, it was held to be "an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is affected by any judicial decision of the question.— In the case of Commissioners of Highways *vs.* Clow and others, 15 John. 537 to 539, the judgment of the Court of Common Pleas was reversed because the decision of the Commissioners had been reversed on an *"ex parte"* hearing *without notice* to them, although by the statute under which the proceedings took place no notice was by its terms required to be given. And in Corlies *vs.* Corlies, 8 Vermont 387 to 389, the same principle is maintained.

Hart *vs.* Huckins, 6 Mass. 400, was an action of entry *sur disseisin,* the process was served by a constable, who was only authorized by statute to serve process in *personal* actions; judgment was rendered by a Justice of the Peace which was carried up to the Common Pleas where it was affirmed, but the Supreme Court reversed it, on the ground that it being a real action, the constable had no au-

thority to serve the process, and consequently the tenant had no legal notice, and ought not to have been called, and that the judgment rendered on his supposed default was erroneous, and in reversing the Judgment the court said: "no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend." And Hollingsworth *vs.* Barbour, *et al.*, above cited, 4 Peters, 472. Denning *vs.* Corwin, 11 Wendell's Rep. 651 and Campbell and others *vs.* Brown, 6 Howard's Reps. 111, were reversed because the defendants had no notice, either actual or constructive.

With these authorities before us so directly in point and so conclusive, we should be (we think) fully justified in reversing this judgment, were there no other objection interposed than the want of notice. But on account of the extraordinary character of this statute, we have deemed it to be our duty to notice its provisions further. It is to be observed that the judgment is required to be entered upon the affidavit of the claimant alone; the execution to issue forthwith directed (if the judgment is in the Circuit Court,) to the sheriff, if in a Justices Court, to a constable, and in either case it is made the duty of the officer forthwith to levy said execution upon the Steam Boat, or other water craft. No discretion is left with the officer; he must levy on and advertise and sell the steam boat or other water craft (unless the defendant should perchance happen to hear of the proceedings, and put in a defence under the onerous conditions imposed by the fourth section of the act) notwithstanding there might be an abundance of other property of the defendants within his reach (or even on board such steam boat or other water craft) to satisfy the execution. We see therefore that a steam boat of great value, might be seized by virtue of an execution for a debt of five dollars (or even a less sum) by a constable, or for any sum over fifty dollars by a sheriff and detained until the next sale day, and then unless replevied must absolutely be sold, notwithstanding the whole cargo of such steam boat might be the property of the defendants, and consist as it naturally would of articles capable of being separated so that the officer would have no difficulty in levying on property in proportion to the amount of the debt claimed.

Such a state of things would we think be against common reason, common right and the principles of common justice. And in the case of Ham *vs.* McClaws, 1 Bay's Reps. 93, it was held that "statutes passed against common right, and common reason are

null and void, so far as they are calculated to operate against these principles. "If consequences, or those manifestly against common reason arise collaterally out of a statute, it is void *pro tanto.*" 1 Harper, 101, cited in 3 United States Digest, 482. No. 4.

But the more serious objection to this statute is, its interference with the right of trial by jury. Under this statute a judgment may be entered up for any sum upon an open account and even without an exhibition of the account or any other voucher, upon the affidavit (as we have seen) of the plaintiff himself, without, too, even the verdict of a jury.

The right of trial by jury, says Judge Story, is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. 3 Story's Comm., 638, 639, Sec. 1760. "In *Magna Charta* it is more than once insisted on, as the principal bulwark of our liberties, but especially in chap. 29, by which it is provided: That no freemen shall be hurt in either his person or property (*"nisi per legale judicium parium suorum vel per legem terrae"*) unless by lawful judgment of his peers or equals, or by the law of the land. A privilege," says Blackstone, "couched in almost the same words with that of Emperor Conrad *two hundred years before.* And it was ever esteemed in all countries a privilege of the highest and most beneficial nature." 3 Black. Comm. 271, Chap. 23. Chapter 29 of *Magna Charta* is in force in this State by virtue of the act of Nov. 6th 1829, adopting the common law and statute laws of England, &c. Thompson's Digest, 21, Sec. 2. Duval's Comp. 357—and article 17 of the schedule and ordinance of the Constitution of this State containing this latter act amongst others in force. The Constitution, Thompson's Digest page 2, Sec. 6, declares that "the right of trial by jury shall forever remain inviolate." The act of the General Assembly under consideration has been passed since the Constitution went into operation, and the question arises therefore whether it is not in violation of the provisions of that instrument. At the time when the Constitution was adopted and when it first became operative it is very certain that the plaintiff below could not have recovered this judgment without "a trial by jury," and the act under which it was rendered wholly dispenses with a jury and expressly authorizes the Judge or Justice of the Peace (as we have seen) to render the judgment not only without

a jury, but upon the affidavit of the plaintiff alone and without notice to the defendant.

The Constitution says "the right of trial by jury shall forever remain inviolate," that is (as is very evident) the right shall (in all cases in which it was enjoyed when the Constitution became binding and obligatory) continue unchanged. It shall "remain inviolate." This term does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be *impaired*. The word inviolate is defined by approved *Lexicographers* to mean unhurt, uninjured, unpolluted, unbroken. Inviolate says Webster is derived from the latin word *"inviolatus"* which is defined by Ainsworth to mean, not corrupted, immaculate, unhurt, *"untouched."* From the plain and obvious meaning of these words, therefore, we conclude that the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation. It will not we think be for a moment contended that the right of trial by jury is not by this act greatly impaired, abridged and restricted. Although it is not totally denied to the defendant, yet under this act he can only have a jury trial when after judgment he may happen to obtain information of the pendency of the proceedings before the sale takes place, and then only upon condition that he swears that he does not owe the whole or some part thereof, and even then only as to the part which he swears he does not owe. Another *condition* is interposed by the act to the enjoyment of this Constitutional right with which it might in many cases be difficult, if not utterly impossible for the defendant to comply, viz: he must give bond with good security, residing in the county where such proceedings may be had, to the plaintiff in double the amount claimed, conditioned for the payment of the eventual condemnation money and all costs thereon, an amount let it be recollected sustained *only* by the affidavit of the plaintiff on which the judgment is in the first instance entered and execution issued and levied.

Now it is very manifest that if the General Assembly may in the first instance dispense with "the right of trial by jury" altogether, and in the second interpose these two novel not to say dangerous and oppressive conditions, it may interpose others indefinitely. If the right in question may be denied in one kind of cases, or only allowed upon onerous conditions, it may in all cases. If it may in

civil cases it may in criminal cases and even where the life of the accused may depend upon the issue.

Therefore the wisdom of that clause of the Constitution which prohibits "the right of trial by jury" from being injured or even "touched" is very apparent. This act allows judgment to be entered up for any amount (no matter how much or how complicated the accounts on which the claim may be based) without any other proof than the affidavit of the claimant himself, and in this case it was actually so entered (or rather upon the affidavit of an agent) without pleadings, without notice· without appearanee by the defendant and *without a jury.*

The court feel the importance of the sacred trust confided to them, of preserving the Constitution of the State unimpaired, and at the same time the delicate duty it imposes of declaring null and void any act of the General Assembly believed to be subversive of any of its provisions.

When however it is remembered with what jealous and scrupulous regard "the right of trial by jury" has ever been cherished and preserved by our Anglo Saxon ancestors, and by the Fathers of the revolution of 1776, a regard transmitted to us their descendants not only with unabated attachment, but if possible with increased interest and regard—a *Magna Charta* shielding every one in the enjoyment of life liberty and property: When these things are borne in mind and a Legislative act in its terms abridges this hallowed right, or its provisions are subversive of the principles of natural justice and against common reason and common right, the duty of the court· though unpleasant and even painful, is too obvious to be doubted or denied. Such an one is the act entitled "an act giving a lien to steam boat men and· others, navigating the Bay and River of Apalachicola," approved January 4th, 1847, and we are compelled to consider it to be against the letter and spirit of the Constitution of this State, unsuited to answer reasonably, rightly or justly the purposes for which it was enacted, and that it is consequently

The judgment must therefore be and the same is hereby reversed, and the cause remanded to the court below with directions to dismiss this suit.

Per Curiam.

PHILIP FRASER AND WIFE *vs.* CHARLES WILLEY.

Where this Court is equally divided in opinion, judgment must be entered affirming the judgment of the Court below.

Where there is such division, the justices are not required to file their opinions in writing before judgment is pronounced.

The statute providing that the justices shall file their opinions "in all cases decided in said (this) Court before judgment pronounced" is only *directory*.

Motion to vacate the judgment heretofore entered in this cause in this court. The grounds of the motion are stated in the opinion.

Fraser, for the Motion.

HAWKINS, Justice:

This case was argued upon its merits at the last term of this court and submitted to it for its decision and the court being equally divided judgment of affirmance was entered and the plaintiff in error now seeks to vacate that judgment and reinstate the case upon the following grounds to wit: *First*, That the court being equally divided in opinion, no judgment could be entered affirming the judgment of the court below. *Second*, that the justices of the Supreme Court did not file their opinions in writing in this case before judgment was pronounced.

These are important questions touching the practice of this court, neither of which have before occurred in this State. Upon a very full examination of them however, they seem to present very little difficulty.

The general rule is that he who makes a motion to reverse a judgment, and takes nothing by it, is to be considered as denied, otherwise the consequence might be that the record would be here forever, and to give effect to that *denial* a judgment of affirmance ought to be given. Bridge vs. Johnson, 5 Wendell 374. In the case of Iveson *vs.* Moore, 1 Salkeld 17, the concluding part of the case is this: The court being thus divided and *there being a former rule to stay judgment*, no judgment could be entered, but *et per curiam* if the court had been divided on the *first* motion the *plaintiff might have entered judgment*, but now this rule must stand or be discharged, and discharged it cannot be, because the court are equally divided

In 1 Ld. Raymond 495, in a note the reporter says: "In this case upon one of the former motions in arrest of judgment a rule *was made that judgment should be arrested,* and now the court being divided the plaintiff could not have the rule discharged nor have judgment. *But if on the former motion the court had been divided judgment would have been entered for the plaintiff.* These cases are therefore authority in favor of the correctness of the judgment in this case. In the Exchequer Chamber it is the practice upon a division to affirm the judgment. Deighton *vs.* Greenville.

And so is the practice in the House of Lords, 1 Shower 36.—Cruise on Fines 222, Irish Edition 118. 2 Tidds' Pr. 1236. A similar decision was made in the Court of Exchequer Chamber in Ireland, in the case of Warburton *vs.* Loveland and Ivie in 1828. 1 Hudson and Brooks, Reps. 725. The same practice has obtained in the Supreme Court of the United States. See the United States *vs.* Worrell, 2 Dall. 388. 11 Wheaton Reps. 59.

The judgment of the court below must be presumed to be right until the court of dernier resort has decided otherwise. Bridge *vs.* Johnson, 5 Wendell, 372. 3 Tidds Pr. 1178. The same rule obtains in Maryland. 5 Harr. and Johnson. 284.

It is a principle of the common law that when a motion is made in a Court of Justice and the Judges are equally divided on the question, the mover takes nothing by his motion. Foot *vs.* Tracey, 1 John. Reps. 54. Iveson *vs.* Moore, 1 Salk. 17. Chapman *vs.* Lamphere, 3 Mod. 156. 1 Shower 46, in note.

As to the second point, that the court was bound in compliance with the statute to file written opinions even in case of a divided court, we have come to the conclusion that it is not requisite or necessary and that it was not the intention of the Legislature that we should do so. The statute is in these words, "The Justices of the Supreme Court shall file their opinions in all cases decided in said court, before judgment is pronounced, which shall be entered of record in the case."

The objects which the Legislature had in view in declaring that the decisions of this court should be in writing, and afterwards printed in the shape of reports appear to be these, that the citizens of the State should have the benefit of the adjudications of their highest legal tribunal, upon all questions or cases brought before it. The decisions of these questions involving as they inevitably must the rights of persons and property, including frequently the inter-

pretation of statutes, becoming in fact rules of action to nearly or quite the same extent as the statutes themselves, the importance of their promulgation must be at once apparent and readily appreciated. It seems clear, that the opinions of the justices *as a Court* are to be written and if there should not be a majority of the court agreeing on one side of the question, there can be no decision. There must be something decided before the statute applies and if the court is divided can there be in the nature of things a decision? The Lexicographers tell us that the term "decided," implies "decision, something that is unequivocal, that puts an end to doubt." Suppose the court stand opposed two to two, are there any doubts removed, is not the case left in the same situation in which it came up, leaving the questions of law involved in it as open questions and subject to future adjudication. Can the opinion of the court be cited as authority in any future controversy? Certainly not, because there is a perfect mathematical balance with no preponderance on either side.

It may be said that there is a *sub modo* decision, inasmuch as there is a judgment of the court, but at most it would appear a decision by operation of law, and not by the court, a *majority* being necessary to produce that result. Nor can we invoke the decision of the judge at *nisi prius* to be thrown in one scale or the other. The cause comes up to be tried *de novo*, with the facts already ascertained, the counsel better and more maturely prepared than in the court below, and is to be decided by a tribunal possessing all the advantages of an Appellate Court. The intention of the Legislature seems to have been to obtain the reasons which have guided and actuated the court in coming to a decision, rather than those which might have operated to produce division and disagreement. Even if we are wrong in this view of the matter, not having filed written opinions in this case, would not affect the validity of the judgment, for the statute is only directory. Statutes directing the mode of proceeding by public officers, are advisory and not essential to the validity of the proceedings themselves unless it be so expressed. 8 Vermont, R. 280. Corless *vs.* Corless, ib. 390. People vs. Allen, 6 Wendell 480. Pond *vs.* Negus, 3 Mass. 230.

Of course we have regarded the question as a purely legal one, having naught to do with inquiries based upon any supposed expediency. With these views, we are of opinion that the motion must be denied. *Per Curiam.*

Philip Fraser and Wife, vs. Charles Willey.

BALTZELL, Justice, dissenting:

The decision of the court in this case is that there is no obligation to deliver opinions where there is an affirmance of the judgment through an equal division of the justices. In this I do not concur, conceiving that the law is imperative, and extends to and embraces both in its letter and spirit all cases disposed of. Its language is the justices "shall deliver opinions in all cases decided."

The court, however, says although there was a judgment there was no decision, and therefore the statute is inapplicable. I find no such distinction in any elementary work of the law, in any book of reports, nor in any statute nor is a citation of any such given by the court. They say Lexicographers "tell us that the term decided implies decision, something that is unequivocal, that puts an end to doubt." Admitting this, does it prove that judgment is different from decision, or are we to infer that judgment implies indecision, something that is equivocal, or that creates a doubt. A more extended reference to the same authority would have found the word decision defined to be 'determination, as of a question or doubt, *final judgment* or opinion in a case which has been under deliberation, discussion.'

Nor is this view of the court as we apprehend sustained by the text books. 1 Black. Com. 69.

Nor by the language of this court itself on repeated occasions—Miller, &c. *vs.* Hoc. "this case must be governed by the *decision* of the court in the preceding case as in the one just *decided,* the *judgment* is therefore reversed." 1 Flor., 197.

In Beatty *vs.* Ross, the Chief Justice *decided* the case and his *decision* being sustained the judgment is confirmed, &c., Ibid. 210.

In Archer *vs.* Duval's administrator by the common law *judgment* followed the *decision* on a demurrer as matter of course, &c. Ibid 203, 204, 207.

Nor by that of other courts.

The Supreme Court of the U. S. uses the two words as follows: "A judgment concludes the subject in which it is rendered and pronounces the law of the case, it puts an end to all enquiries by *deciding it.*" 3 Peters, 204.

"The decision of a Court of Record is conclusive, and whether

its decision be correct or not its *judgment*, until reversed· is binding on every other court." 1 Peters, 340.

Whilst the words are used indiscriminately, in correct legal acceptation the judgment may be regarded as the formal expression of the decision spread out on the record by the clerk.

Nor is the distinction maintained in the various statutes referring to the final action of our courts.

Thus in the second section of the law of the first State Legislatures organizing the Supreme Court of the State we find these words together: "The acts of the Governor and Council now in force, and providing for regulating appeals from the judgments, or decrees, *or decisions* of the Superior Courts of the Territory to the Court of Appeals or writs of error for the review of *decisions* of said Superior Courts shall as far as applicable be in full force, and be deemed to apply to said Supreme Court."

In the 14th section of the same law "That all cases now pending in said Court of Appeals shall be transferred to said Supreme Court, and tried and *decided* therein and thereby. Laws of 1845, p. 13.

It is under this section the court took jurisdiction of the case under consideration, and from it derived their power over it. If the case is not *decided* this part of their duty would seem yet to remain.

The provision for the delivery of opinions is in this same statute. The sixth section of the law regulating the mode of suing out writs of error, and prosecuting appeals has this provision "That the said Court of Appeals may order the record of the judgment with their *decision* and determination thereon in writing duly certified to be remitted to the said Superior Court· and the said *decision* and determination shall be carried into execution by the officers of the said court or the said Court of Appeals may award execution to carry into effect its *decisions* and determination." Duval, 109.

Now we can scarcely imagine authority more direct and express—the decision is to be remitted—the decision carried into effect. If the court has sent their mandate without a decision the law would seem not to have been complied with.

Again the opinion asserts that "although there was a judgment it was by operation of law *and not by the court.*" Here there is no reference to authority, and the question occurs if not made by the court, who or what other power is there that can rightfully, under

the Constitution and laws of the State make it? All judgments are by operation of law, but can the law operate to make a judgment in the absence of, or without a Court?

"The record however, does not in my judgment, sustain the allegation that the judgment was without a Court.

PHILIP FRAZER and WIFE, adm'rs, &c., *vs.* CHARLES WILEY. } January Term, 1847.

Present Hon. THOS DOUGLAS, Chief Justice, Hon. THOS. BALTZELL, Hon. GEO. S. HAWKINS, Hon. GEO. W. MACRAE, Justices.

This day came the parties by their attorneys, and the transcript of the record of the judgment aforesaid being seen and inspected, and said parties being fully heard by counsel, and the court being equally divided in opinion, it is considered by the court that the said judgment be affirmed," &c.

The question is asked as not admitting of any doubt, "Is not the case left in the same situation in which it came up, leaving the questions of law involved in it as open questions, and subject to future adjudications?" Can it be the design to say, that the case is open in the Circuit Court, and to be tried there again? This would seem to be the fair inference, for the Supreme Court had refused to take farther action of it,by declaring the judgment of the former term valid. We have, however, thought this scarcely possible. If yet subject to future adjudication, it must be by the Supreme Court; and if so, the question arises, why was the motion of the plaintiff to reinstate his case overruled?

Again, it is said that the opinion of the Court in such a case is not authority. With due deference, this question is more appropriate for the tribunal before which the decision may hereafter be quoted. Courts do not usually attach to their opinions when delivered the estimate to be placed upon them, nor pledge themselves in advance to recognize or reject any case as authority. But why is this case not authority? As the judgment of the Circuit Court, expressing the law of the case, until reversed it is authority—when that judgment is affirmed by the Supreme Court is there a diminution of its authority? The Judge of the Circuit Court declared the law of the case, the Supreme Court affirm the judgment, thereby giving the sanction of that tribunal to the law as declared by the Court below.

A reversal obviously would have destroyed the authority of the

case; but that an affirmance has this effect, is to confound and utterly annihilate the meaning and sense of terms. This would be to place the Court in the contradictory position of maintaining by their *judgment* the right of one of the parties under the law which by the qualification attached to their opinion they maintain that he is not entitled to—in other words affirm the case as to the parties, but reverse it as authority for other cases and this upon the ground that the "Court stands opposed two to two—or is divided and in such case it is said there is a perfect mathematical balance with no preponderance on either side." With due deference we cannot admit the propriety of this language, we do not admit that a Court can be divided. By law a majority of the judges is sufficient to transact business and the agreement of more than half of these will be sufficient to decide a case although this majority may be less than half the number of the judges, thus in a judicial body of twelve, seven present would be a quorum and four concurring as to a case would render the judgment though in fact constituting only one third of the judges. In a body consisting of five judges a quorum consists of three and two of these concurring render the judgment of the Court. In Legislative assemblies this is also the case. In the instances of the judicial bodies above stated the four in the one case and two in the other constitute the court, in the Legislature the majority of the quorum constitute the Legislature and this by operation of law. A concurrence of a sufficient number of judges to do business, to give judgments to decide cases then constitutes the Court and in case of concurrence with them although there may be disagreement or division amongst the judges there is no division of the Court. This is the law of its organization.

A similar law prevails in the structure and organization of Appellate Courts, and Courts of Error of the last resort, where there is an equal division of the judges. In such cases by the settled rule the judges in favor of affirmance constitute the Court, there is then by operation of law an affirmance of the judgment, a declaration by the Court that the judgment of the Court below is right and must be carried into execution. Such is the case in the House of Lords in England, Court of Errors of New York—of Maryland. In this Court also as announced in the present case and repeated again in the case of Williams and Moseley the same law prevails. In cases depending in other Courts it is a principle "where the judges are divided the mover takes nothing by his motion, *there is no judgment,*" the invari-

able practice of the Court of Kings Bench and of the Common Pleas being *not to give judgment* in case of a division of opinion of the judges." 1 Strange, 383.

With due deference, by not attending to this distinction the mistake has been committed of saying when the court is divided "the principles of law are not settled, the question is not decided," &c.,—"the case only is settled, not the law in this court." With great propriety this language may be applied to cases of division in the Kings Bench and Common Pleas where there is *no judgment*. Can it however apply where there is decision and a judgment rendered?

These positions as to the law not being settled, the question not decided, but only the particular case, &c., are so opposed to the principals and mode of action by which courts profess to govern as to be irreconcilable with reason and propriety. According to Blackstone "judgment is the conclusion that naturally and regularly follows from the premises of law and fact, &c., which judgment or conclusion depends not therefore on the arbitrary caprice of the judge but on the settled and invariable principles of justice." 3 Black. 396.

"It is the sentence of the law pronounced by the court upon the matter contained in the record." 3 Black. 395. "A court when it constructs a judgment forms it of certain materials which are law, these materials the court does not make and so far the judgment is not creative of law. These materials consist of the divers laws within the realm, of maxims, principals, rules, intendment and reason of the common law, report books, records and other authorities of law." Ram on Jud. 2.

If these materials are rejected in the decision of a case what substitute is to take their place? Can they give a judgment without their use, indeed rejecting them by their own admission? Is not this the giving of a judgment which is not law and therefore reversing the sense and meaning of the term? Is it not substituting the mere dixit of the judge in place of a decision based upon the settled and invariable principles of justice? Can there be a law or rule of action applicable to two parties and their rights which is not applicable to all parties and all rights of the same kind?

I will not be understood as contending that a decision of this kind is of the highest or best authority. My position is that it is authority lessened in weight by the fact that it was rendered by a

divided court. Ram on Judgments in speaking of "the circumstances which may lessen the value of authority," specifies cases "where the court was equally divided or were not unanimous in opinion," p. 183.

A higher authority is to be found in a case decided by the Supreme Court of Vermont and taken from Washburn's Digest. "It must be a very clear case and one unsusceptible of doubt which would lead the Supreme Court to disturb a question which had been settled in previous years even though that decision were given by a court divided in opinion." State *vs.* Bosworth, 13 Verm. 402. I insist then that there has been a decision of this case by this court and of the questions and principles of law involved in it—that it is absolute and valid as if concurred in by all the Judges—that it is the law of the case and of all other cases similarly situated until like all other authority it can be assailed by showing that it was not law.

If the case was decided the statute is applicable unless although within its letter it is not within the spirit of its provision. Nor is there a reason why an opinion should not be delivered in the case of a divided court. This involves an enquiry into the reason of judges delivering opinions at all in any case. This is given by the judges both in England and America in language of this character.

In England said Lord Kenyon it has long since been held to be the great duty of every court of justice to administer justice as well as they can between the litigating parties—another and not less material duty is to satisfy those parties that the whole case has been examined and considered. 6 T. R. 408.

Next to doing right the great object in the administration of public justice should be to give public satisfacton. 3 Black. 391.

The expressed reason of a judgment is an important ingredient in it, the reason of a resolution is more to be considered than the resolution itself. Ram 21.

Next to doing justice said Chancellor Dessassure, in a sentiment quoted with approbation by the Supreme Court of South Carolina, the greatest consolation of judges, is so to administer that justice as to satisfy the parties that the merits of their causes have been fully bought, well considered and impartially decided. 1 Hill Ch. 453.

In a recent case decided in the Court of Exchequer one of the judges said although Ld. Lyndhurst has in a great degree antici-

pated the judgment which I intended to deliver, the parties to the cause are entitled to be satisfied by knowing the opinion of each judge and the grounds on which it is founded. Ram on Judgment, 20.

"It is not only a justice due to the public and the parties," said Lord Mansfield, "to weigh well the grounds and reasons of the judgment, but it is of great consequence to explain them with accuracy and precision in open Court, especially if the question be of a general tendency, that the law of the land may be certain and known."

It is this course of these courts that has obtained for them the tribute of the most distingushed of the jurists of America. Every person well acquainted with the contents of the English Reports must have been struck with the unbending integrity and lofty morals with which the Courts were inspired. I do not know where we could resort among all the volumes of human composition to find more constant, more tranquil and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the Iron times of the Tudors and follow judicial history down from the first page in Dyer, to the last page of the last reporter, we should find the higher Courts of civil judicature generally and with rare exceptions, presenting the image of the sanctity of a temple where truth and justice seem to be enthroned and personified in their decrees." 1 Kent. Com., 496.

Nor have the American Courts been wanting in this respect having earned a like deserved distinction. Did those judges however content themselves with discussion and the delivering of opinions in cases only when they were all agreed? By no means, their noblest triumphs were earned, their greatest efforts made in cases of disagreement, in cases of doubt where the highest stretch of ingenuity and talent were required to attain and develope the truth. It is there indeed discussion, debate and effort are required and wanted. "All opinions, yea errors known, read and collected," says an eminent writer, "are of main service and assistance towards the speedy attainment of what is truest. Truth arises from the collision, and from hence springs liberty which is a security from the effect of reasoning." We do not require a beacon when the channel is deep and free from impediment.

Supposing that we are mistaken in the opinion that the case was decided, that there was a Court to give judgment and that it is not open to future adjudication, we ask then if the parties even in a

case so situated have not rights and the public to be satisfied how and why a judgment has been so rendered?

If right in the opinion that the two judges constitute the Court does not a singular responsibility devolve upon those thus assuming the high and solemn duties of this exalted tribunal to explain satisfactorily and conclusively a judgment which they assert in opposition to the respectable authority of two of their brethren. It does seem to us in proportion to the delicacy of that position is it a duty on their part clearly and beyond all question to vindicate and sustain the propriety of their judgment.

Clear in the opinion that the construction given is against the letter as well as the spirit of the law, there are other reasons no less cogent in my view against it founded in the very organization of the Court itself. This is the highest judicial tribunal of the land it is of the last resort except in very few instances, it undertakes to administer the law according to the course of the most enlightened Courts in this country and in England. They all in their action for centuries past in England and since the time of their organization in this country as we have seen, have been distinguished for the discussion, the careful and attentive examination and consideration of questions and principles. Their records are a proud monument in their favor of an adherence to truth and right and principle maintained over the occasional ascendancy of error and mistake. To their honor and glory be it spoken, there has been no ipse dixit of the judges, no mere mandate as the order or command from an executive officer; such is not and it is to be hoped never may be the mode of action of the Courts in this country. They have sustained themselves and can ever only sustain themselves by basing their decisions upon justice and right and explaining to the citizen the grounds and reasons of their decision. The opinions of the Court are the only means of communicating with the people, their protection against perversion of facts and law—against misrepresentation, against error and mistake, they are important alike to the judges, to the parties and to the people and any omission, restriction or abridgement of the duty is calculated to be alike injurious to them all.

CALEB H. BLOOD *vs.* RICHARD A. SHINE.

Everything is to be presumed and every reasonable intendment made in favor of an award.

Where arbitrators agree on some of the facts, but differ with respect to others not connected with the first, there seems to be no good reason why the umpire, if he thinks proper, may not take those points on which the arbitrators agree to be as they report them, provided a re-examination is not required by the submission, or by either of the parties before he makes his award.

An award of payment of a specific sum is sufficient without directing a release from the party to whom it is to be paid.

Though an award should not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things mentioned in the submission it is sufficient.

When an award does not fix the time of payment of the sum awarded, the money is payable immediately.

Error to Leon Circuit Court where this case was tried before Judge Baltzell.

Archer, for Plaintiff in Error:

The Court erred in refusing to admit the award in evidence and in deciding that it was void upon its face.

The award of the umpire Argyle is a valid award. He adopted the statement of accounts made and agreed to by the arbitrators, and proceeded to decide the other items about which the arbitrators disagreed. Having added both the sums together, he awards the total amount to the plaintiff. This the umpire had a right to do, and had he done otherwise he would have deviated from the usual practice in such cases. See Harman *vs.* Arthur, 1 Baily, 81.

"When the arbitrators have agreed on some facts, but differ with respect to others unconnected with the first, there seems to be no good reason why the umpire, if he thinks proper, may not take those points on which the arbitrators agree to be as they report them."—By the adoption of their conclusion they become his decision. See Kyd on Award, 102. 4 Term Rep., 589. 5 Barn. & Adolphus, 488. Watson on Arbitration & Award 64. 1 Tomlin Law Dict. 144. Bates *vs.* Cook, 9 B. & C. 407.

The umpire may *thus* decide the *whole controversy*. At all events no objection to the award can be made on account of adopting the partial decision of the arbitrators, unless taken before award made, which was not done in this case.

As to the form of the award in this case, it is unobjectionable.—It is plain, intelligible, and to the point, and is in much better form than it would have been if the meaning of the umpire had been attempted to be expressed in technical legal language not understood by him. As now expressed, no doubt exists as to the amount awarded, and that was the object to be attained.

The Courts favor this mode of settling differences, and do not scrutinize the form of the proceedings of a Court of arbitrators. Their common sense and practical judgment may safely be relied on to obtain a just settlement of differences submitted to them. So it appears what is the decision made by such Court between the parties it matters not what is the form. Everything is presumed in favor of an award made like this under a bond of submission, and not under the order of a Court (where the Court may and does require some attention to form) and the award is good if expressed in the form of an opinion. 4 Phillips Ev. 80.

As to the appointment by arbitrators of J. W. Argyle as umpire, it is made in accordance with the bond. But if it were not, the parties having acquiesced in the appointment would be bound by his award. The parties cannot appear before an umpire, submit their evidence, have a full hearing and after award made, object to his appointment. 4 Phillip's Ev. 80. Watson *vs.* Trower, 1 Ryan & Moody, 18.

Hagner, for Defendant in Error:

Before entering into investigation of errors assigned, I wish to lay down some principles applicable to the form of the submission in this case.

1st. I say that the scope of power and authority of the umpire is regulated by the submission, and is in this case as broad as that to the arbitrators originally. Parties may submit to umpire *all* matters, or only *such* as arbitrators differ upon. Billing's law of awards 106. 1 Comyns Dig. p. 678 at top.

Here the power to the umpire is co-extensive with that to arbitrators.

The Umpire designed by the parties was an umpire to be appointed *of and concerning the premises,* and to be the umpire between Blood & Shine. When appointed to take place of arbitrators. Watson on awards 56—63. 2 Dallas Rep., 271.

The umpire as well as arbitrators is the Judge of the parties and he ought to be appointed according to the submission and the powers there designed should be entrusted to him. Billings law of awards, 112.

Here in the case at bar what was his appointment? *He is appointed umpire between the arbitrators* as they disagreed on two items, and power only over that disagreement is given to him. Such was his commission, *this commission was void* 112.—and all actions under it of course *null. Billing's* law of awards Kyd on awards 101, and cases cited p. 103. Tollit *vs.* Sanders, 9 Price 612, and case from year books 30 Hen. 6, cited by the Judges of Exchequer. Willis Rep. 268. Tarker *vs.* Kearny, 2 Barnard 317. 6 Harr. and John. 406. 4 Dallas Rep. 232.

Now if there was no appointment of an umpire *according to the submission* clearly the appointment made was a nullity, and it matters not if he did arbitrate on the whole causes of difference. Unless *duly* appointed to take charge of the whole, his action was void for the excess and as he could be appointed here but as umpire *of and concerning the premises,* not having been so appointed, his award was void. Void in its inception, it cannot be sustained by evidence *aliunde.* Watson on awards 115. For this reason we hold there was no error in the judgment.

The counsel for plaintiff in error insists that the courts are more lenient to awards under submission bonds than where made rules of court. Now the very reverse is the case. Courts will not on motion, where awards are rules of Court, set aside awards but leave parties to their action on the award. Watson on awards 155. 2 Dow. and Ry. 222, and also 2 B. & C. 170.

If I am right in my view of the commission here given to Argyle it is a matter of small moment to inquire whether he did adopt that the arbitrators had done. He had no such power, he was to decide the difference between the arbitrators themselves; *he never was the umpire between* the parties nor was he *umpire of and concerning* the premises in the bond mentioned.

How idle then the attempt to sustain his action by evidence *aliunde.*

But the counsel insist that the umpire may take those points decided by the arbitrators and incorporate them with his own. The cases I have cited contradict this. 1 Baily South Carolina Rep. 81, is however cited to sustain it. By reference to it Judge Colcock it will be perceived sustains it by Mr. Kyd's opinion p. 102 and that other case Hall *vs.* Lawrence, 4 T. R. 589.

See in what low esteem this case is held, 4 Dallas Reports before cited.

Yet giving 4 T. R. 589 full power, it was in a case of rule of court, where as I have shown the courts are disinclined to set aside awards on motion, and all the court did *was to refuse to set aside on motion.*

Mr. Kyd's opinion is not sustained by either English or American authorities.

Again the award set up is void, neither expressly nor impliedly awarding a release. 1 Saunders Reports 327 [a] note 2.

The declaration is defective. In the award set up no time is fixed for the payment of the money awarded, it is then payable *on demand.* Now in such case it is very clear, a special demand must be alleged and the general averment "although often requested," &c., will not suffice. 1 Saunders Rep. 33. Kyd on awards p. 295.

The award is not *final,* it does not make an end and determination of all matters contained in the submission. Watson on awards 126.

It is not *mutual;* all things are here awarded to be performed by one party without such being in satisfaction of the matters in controversy. Watson on awards 131.

By reason of the *nullity* of the award it is plain that *Shine* cannot have the advantage intended him, as a recompense or consideration for that which he is to do to the other party *Blood.* He has no release, even if he pay. The award for this reason is void in the whole. Watson, p. 136, 2 Saunders 293 n.

DOUGLAS, Chief Justice, delivered the following opinion:

This is an action of debt upon an arbitration bond by which the parties agreed to submit to the arbitrament and award of certain persons therein named, all and all manner of actions, cause or causes of action, bills, bonds, agreements, deeds, accounts, quarrels, controversies and demands whatsoever at any time or times theretofore,

had, made, brought, prosecuted, done, suffered, committed or depending, by or between the said parties or either of them, of and concerning a partnership in a certain brick yard and the profits and losses thereof, and also any and all other demands, controversies, debts and transactions whatsoever. The arbitrators to make their award on or before the sixth day of May (then) next ensuing; but if the arbitrators did not make their award on or before that day then the said abitrators (were) to appoint and umpire between the parties &c. The arbitrators took upon themselves the burden of the arbitration and as appears investigated the transactions and accounts between the parties; stated an account and struck a balance for $1181 76 in favor of C. H. Blood, when they disagreed and appointed an umpire. In relation to which disagreement—appointment of an umpire and action of the umpire, the following entry appears as is shewn by the bill of exceptions which constitutes a part of the record in this case, next after the statement of the balance above mentioned, viz: "We the arbitrators disagree respecting C. H. Blood's account of $434 32-100 and R. A. Shine's offset of $125 and we name John W. Argyle as umpire." This is signed and sealed by all the arbitrators, dated Tallahassee, May 4th, 1844, and is succeeded by the following entry, to wit: "The umpire appointed by the arbitrators of the unsettled accounts of R. A. Shine and C. H. Blood and referred to him for settlement as per statement of the arbitrators annexed, reports the said accounts adjusted and stated as follows:

R. A. Shine, To C. H. Blood,	Dr.
To Balance as stated by the arbitrators on the 6th day of May 1844, annexed	$1181 76
To amount of C. H. Blood's account.....	434 32
	$1616 08
Cr.	
By Territorial Certificate signed Robert Armstrong, considered spurious	125 00
	$1491 08

This amount, one thousand four hundred and ninety one 8-100 dollars reported to the credit of and awarded to C. H. Blood.

December 7th, 1844. (Signed) John W. Argyle, umpire."

At the trial of the cause in the court below this award was of-

fered in evidence by the plaintiff, and was ruled out by the court on the ground that it was void and incapable of being sustained by proof *aliunde*. No other evidence being offered on either side the jury rendered a verdict for the defendant upon which judgment was entered and the plaintiff in error now seeks to reverse that judgment on the following grounds which he has assigned as error, viz:

First, The court erred in sustaining objections to the introduction of the paper writing offered in evidence by the plaintiff mentioned in the bill of exceptions.

Second, the court erred in deciding that said paper writing was void and incapable of being sustained by evidence *aliunde*.

Third, The court erred in giving judgment for the defendant.

In ruling out the paper writing we think the court erred. We do not perceive on what ground it can with propriety be declared void. It is contended on behalf of the defendant in error, that the umpire was not appointed of and concerning the premises, but it will be observed that the arbitrators in making the appointment, very properly abstained from attempting to limit his powers which they had no authority to do. They said "we name John W. Argyle as umpire." His appointment being general, his authority is to be sought for in the arbitration bond on which this suit is founded. It was therefore, precisely what the parties thought proper to make it. In the case of Tollit *vs.* Saunders, 9 Price's Exchequer Reports, 612, cited (and much relied upon) by the Attorney for the defendant in error, the arbitrators disagreed and appointed an umpire, not generally as here, not to decide between the *parties*, but to decide *between themselves*, and the court, in declaring the appointment invalid, puts its decision expressly upon that ground.

Again it is said that the umpire adopted what the arbitrators had done, and made that a part of his award. It is true he states the same balance which the arbitrators stated. It does not however appear but that he examined the testimony and came to the same conclusion to which they had come, as to the just and correct balance. But it is insisted that he did not re-examine the testimony and that his award is for that reason null and void. Neither of these objections appear upon the face of the award, nor is there any proof in the record to sustain them. And every thing is to be presumed and every reasonable intendment made in favor of an award. Archer *vs.* Williamson, 2 Harr. & Gill, 67. Richards *vs.* Brock-

enbrough, 1 Rand. 449. Karthans *vs.* Ferrer, *et al.*, 1 Peters, 222. Coupland *vs.* Anderson, 2 Call 106. Frychng Canal *vs.* Frye 5 Greenl. Rep. 67.

But if the fact were as urged that the umpire did not take the account as the arbitrators stated it in their report of the matter and incorporate it into his own, we see no reasonable objection to it. The Court of Appeals of South Carolina in the case of Executors of Finney *vs.* Miller, 1 Baileys Law Reps. 81. 82, held that "where arbitrators had agreed on the facts and only differ on a single point either with respect to the law arising on those facts, or as to the extent of the recompense to be made by one party or the other, or even where they agree on some facts, but differ with respect to others unconnected with the first (which is the case before us) there seems to be no good reason why the umpire if he thinks proper, may not take those points on which the arbitrators agreed to be as they report them."

The nature of their duty (said that Court) is to make a final decision upon the whole subject in dispute, where the arbitrators cannot do it, and by adopting their opinion as far as they agree and incorporating it with his own on the other part, he effectually makes the final determination. This case was cited and the principles which it maintains were sustained in the case of Lipsey *vs.* Hughes, 2 Bailey's Law Rep. 113, in which Mr. Justice O'Neal confirming the instructions to the Jury by Mr. Justice Gantt at Union Fall Term, 1830, said that the umpire may award upon the report of the arbitrators *without* re-examining the witnesses unless he is directed to do so by the submission, or it is afterwards required of him by one or the other of the parties before he makes his award. (Harper and Johnson, Justices, concurred.) And this is in accordance with Hall *vs.* Lawrence, 4 Term Reps. 589, where the Court refused to set aside the award of an umpire because he received the evidence from the arbitrators, without examining the witnesses, he not having been required to re-examine them before the making of his award, and with the reasoning of Mr. Kyd in his able work on Awards page 102. Saulbury *vs.* Hodson. 2 Burr. 1474. 1 Black Rep. 463.

In this case there was no such requisition upon the umpire by the submission or either of the parties, and we fully agree with the learned Judge who pronounced the opinion of the Court in the case of Executors of Finny *vs.* Miller when he says. "If the parties are

suffered to lie by, and after the award is made to avail themselves of these technical objections, you utterly destroy this admiral domestic forum."

It was further objected that this award is not mutual, that no release is awarded to Shine, &c. In regard to this we cannot do better than to adopt the language of Mr. Justice Trimble in delivering the opinion of the Supreme Court of the United States in the case of Karthans *vs.* Ferrer, *et al.*, 1 Peters Reps. 230.

It is deemed (he says) a sufficient answer to the objection of want of mutuality in the award, to remark, that great stress was laid in the early cases upon the mutuality of an award, but at present it is by no means considered necessary that each party should be directed to do or not to do any particular thing. Cald. on Arbi., 113. Two had submitted to an award; nothing was awarded to one party, but that all actions should cease. The Court held it a good award. Harris *vs.* Knight, 1 Levintz 58. In Palmers case, 12 Mod. 234, one party was directed to pay money to the other, without any directions being given to the latter any way. Again it was awarded that A. should pay B. 40 shillings for trespass, Freeman 204. These respective awards were held unimpeachable. In McKinstry *vs.* Solomons, 2 John. 57 and 13 John. 27 an award of payment of a specific sum is held final and sufficient without directing a release from the party to whom it was paid. And so in Byers *vs.* Van Denson, 5 Wendell 268.

Again, it is objected that the award does not embrace all the matters submitted, but it seems to embrace all the matters shown to have been in controversy and indeed in effect to settle all. In Smith *vs.* Demarest, 3 Halstead 195, it was held that though an award should not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things and matters mentioned in the submission it is sufficient. And in Jackson ex dem. Van Alen and Van Alen *vs.* Ambler, 14 John. 96, that although an award must decide on all the questions contained in the submission, yet it must appear that the points not decided upon were actually in controversy between the parties. Now it does not appear in this case that there was any matter in controversy submitted that was not decided, and "unless they were brought forward they were not to be decided." Jackson *vs.* Van Alen, 14 John. 107. Nor is it to be intended unless it be shown. Smith *vs.* Demarest, 3 Halst. 198.

It is to be presumed that the parties brought all the matters in controversy between them before the arbitrators, and all the matters brought before them were decided. In Copeland *vs.* Anderson, 2 Call's Reps. 100 the court held that if cross suits be referred by the parties, a single award that one of them is indebted to the other in a balance of account, is sufficient to settle the whole controversy. But it is said the award does not fix the time of payment and that therefore a special request to pay was necessary. But when the award does not fix the day of payment the money is payable immediately. Inlay *vs.* Wykoof, 1 Southard 132. (cited in 1 United States Digest page 214—No. 370) and this in accordance with the general principles of the law on this subject. The case of Brett *vs.* Ming, Florida Reps. 454 and authorities there cited fully recognize and sustain these principles. We are aware that upon some of these points different views have been entertained and conflicting decisions made. That being the case we must adopt those which seem to us to be most in conformity with reason and justice and most conducive to the general good.

The Judgment of the court below must be and the same is hereby reversed, and the cause remanded to the court below for further proceedings in accordance with this opinion.

Per curiam.

Isaac W. Mitchell, vs. Frederic R. Cotten, Executor of John W. Cotten.

ISAAC W. MITCHELL, *vs.* FREDERICK R. COTTEN, EXECUTOR OF JOHN W. COTTEN.

Where plaintiff's demurrer to defendants plea was overruled, and the judgment was *respondeat ouster* and the plaintiff afterwards filed a replication to the plea, the demurrer is waived thereby, and the plaintiff cannot assign for error that the court erred in overruling the demurrer.

In an action by the payee against a security on the note, the principal may be examined as a witness for defendant to prove that the note was given upon usurious considerations.

Where a note not tainted with usury has been given up and cancelled on being made the consideration of a usurious contract or note, and the usury in the latter has been established, the note cancelled may be recovered upon, as well against a surety as the principal, under the common counts.

Writ of Error to Leon Circuit Court, where this cause had been tried before Judge Baltzell.

The facts fully appear in the opinion of the Chief Justice.

Brockenbrough & Thompson, for Plaintiff in Error.

Randall & Hagner, for Defendant in Error.

DOUGLAS, Chief Justice:

This is an action of assumpsit instituted by the plaintiff in error in the Leon Circuit Court against the defendant in error as executor, &c., of John W. Cotten, deceased, to recover the sum (alleged to be) due upon a promissory note, of which the following is a copy, viz:

"On or before the first day of January next, we or either of us, promise to pay to Isaac W. Mitchell, or order, fifteen thousand nine hundred and fifty-five dollars, with ten per cent. interest from date, for value received this 2d January, 1841.

[Signed] H. DOGGETT,
J. W. COTTEN."

The declaration contains a count upon the note, the common money counts, and a count on an account stated. The defendant plead:

First, The general issue.

Second, That he did not make the note.

Third, Want of consideration.

Fourth, Judgment recovered by Mitchell against Doggett on the note.

Fifth and Sixth, That John W. Cotten executed the note as surety of Doggett, and that Mitchell and Doggett entered into a secret agreement, concealed from J. W. Cotten, by which Doggett was to pay a greater rate of interest than was expressed in the note.

And the 6th plea alleges that the rate of interest expressed was ten per cent. and by said secret agreement Doggett was to pay two and an half per cent. more, and that Doggett gave to Mitchell his separate note for the two and an half per cent. bearing even date with the note sued on, amounting to the sum of $398 87, payable on or before the first of January 1842, for such excess of interest over and above that secured by the note sued on.

Seventh, That John W. Cotten executed the note sued on as surety of said Henry Doggett, and that after the making of said note to wit, on the 5th day of January, 1844, the plaintiff agreed with the said Henry Doggett, without the consent or knowledge of the said John W. Cotten, and for, and in consideration of, the making and delivery by the said Doggett of his promissory note dated the 5th day of January, 1844, payable one day after date to said Mitchell (the plaintiff) or bearer, at Tallahassee, promising to pay $6,676 64, for value received with ten per cent. interest from the first of said month, which note the plaintiff received to give further day of payment during the space of one year to wit, during the year 1844.

The Eighth. Is in substance the same as the seventh only alleging the contract and agreement for further time to have been made after the note sued on was overdue, and that the consideration was paid in hand.

The Ninth, Raises the same question as the eighth.

The Tenth, Non assumpsit except as to the sum of $6676 64, and as to that sum payment.

To the plea of non assumpsit the defendant annexed a notice of special matter to be given in evidence embracing in substance the same matter as embraced in the several special pleas, setting out the charge of usury somewhat more fully and specifically, and alleging divers usurious contracts.

To the 4th and 5th pleas the plaintiff demurred, and his demur-

rers were sustained. Upon the other pleas issues were respectively joined. It appears by the bill of exceptions which constitutes a part of the record in this case that the cause came on to be tried upon the issues joined between the parties and a jury of good and lawful men were empanneled and the plaintiff introduced the note mentioned in the declaration with the following endorsement thereon, viz: "Received the interest on the within note up to the first day of January, 1840, from the fifth day of February, 1844," and there rested his case.

The defendant then read in evidence the deposition of Henry Doggett, (one of the parties to said note) who proved in substance that the real bargain between Mitchell and himself, at the time of making the note, was that Mitchell was to receive for the loan of the said money 12 1-2 per cent. That he made and delivered to said Mitchell his promissory note for the sum of $398 87, that the consideration thereof was two and a half per cent. additional interest on the note for which Cotten was surety. That he gave to Isaac W. Mitchell his promissory note dated 5th January, 1844, payable one day after date for $6,676 64 bearing interest at the rate of ten per cent, and he thinks exhibit C. a copy. That the consideration of said note was interest on the note for which Cotten was surety as the following statement, which is copied from a statement in Mitchell's hand writing, will show:

15,955 05
2 1-2c

398 87, and interest on do. at 12 1-2 per cent compounded to the 1st of January 1844, 507 06, interest to 1st January, 1842, at ten per cent 1,595 50.

Interest to January, 1843:	1,755 05
	438 75
	449 73
Interest to 1st January, 1844:	1,930 56
	$6,676 65

That the amount of interest secured to be paid to Isaac W. Mitchell is $6,676 65, which is evidenced by his note for the amount dated 5th January, 1844.

That at the making of said note of $15,955 00, there was a contract made by Mitchell and himself, that he, Doggett, over and above the interest mentioned in the note, should pay to Mitchell the fur-

ther rate of 2 1-2 per cent additional interest. That no money has been actually paid for the said interest, but is secured to be paid by his note of 6,676 65, before referred to.

On his cross examination he further proved that himself and J. W. Cotten, on or about the 1st of January, 1839, gave a note for $13,186 00 to Isaac W. Mitchell, that J. W. Cotten was equally bound with him; but as surety; the consideration of $13,186 00 was the indebtedness of witness to one Flake for land. There was no usury in said note of $13,186 00 or in the note to Flake. That note was taken up by substituting the note of $15,955. J. W. Cotten signed both notes and was bound with witness as surety—both notes expressed, on the face of them, to carry ten per cent interest. The usury he says began when he executed the note for $15,955, with Cotten as surety and his note for $398 87. This note was for usury, the excess of interest for the forbearance of the large note.

The defendant then offered Lawrence O'B. Branch as a witness who testified as follows, to wit: that the original papers filed, marked A. B. C. D. E. F. G. H. were original papers placed in his hands by H. Doggett. The paper marked D. witness believes contains the genuine signature of H. Doggett across said paper; that he likewise believes the signature on the paper A. to be Doggett's signature, so also the signature on papers B. he believes to be the remains of the signature of said Doggett and John W. Cotten, that he is acquainted with their hand writing, &c.

The defendant then offered George K. Walker and Charles G. English as witnesses to prove certain papers marked C. D. E. F. G. H. I. none of which are deemed very material to the present enquiry except the following, viz:

[D.] On or before the first day of January next, we or either of us promise to pay Isaac W. Mitchell, or order, thirteen thousand one hundred and eighty-six dollars, for value received, with ten per cent interest from date, the 1st January, 1839. [The words "Paid—H. Doggett," written across the face.]

[E.] On or before the first day of January next, I promise to pay Isaac W. Mitchell, or order, three hundred and ninety-eight dollars and eighty-seven cents for value received this 2nd day of January, 1841.

One day after date, I promise to pay Isaac W. Mitchell or bearer, at Tallahassee, six thousand six hundred and seventy-six dollars and

sixty-four cents for value received, with ten per cent interest from the first of the present month this fifth day of January, 1844.

[Signed.] H. DOGGETT, [SEAL.]

Which the witnesses testify are in the hand writing, in words and figures, of the plaintiff except the signatures.

James H. T. Lorimer was also introduced to prove the papers marked A. and B.

[A.] One day after date we jointly and severally promise to pay William Flake or bearer five thousand and sixteen dollars, for value received.

January 1, 1838. H. DOGGETT,

Endorsed, D.

JANUARY 1st, 1838.

Received of the within note four hundred and thirteen dollars and fifty-five cents.

Received of the within note one thousand three hundred and sixty-nine dollars and 11-100.

January 1st, 1838.

[B.] On or before the first day of January, 1839, we jointly and severally promise to pay William Flake or bearer, eight thousand three hundred and thirty-three dollars with interest from the 13th day of December, eighteen hundred and thirty-six, for value received. H. DOGG

January 1, 1838. J. W.

Are in the hand writing of one Doctor Flake; he said he had seen Flake write, and believed the papers were in his hand writing—he further said he heard Flake say he intended to sell two notes to plaintiff, and afterward heard Mitchell say he had bought them. He once had a conversation with plaintiff in which he stated that whatever may be said as to the small note he (plaintiff) held against Doggett, no one could say there was any usury in the large one. The small note, Mr. Lorimer understood, was for interest on the large one. Defendant then offered said papers marked A. B. C. D. E. F. G. H. and I., as evidencee, which plaintiff's counsel objected to, but were overruled.

Plaintiff then gave in evidence the following letter of John W. Cotten proving first the hand writing by Jacob Elliott a lawful and competent witness.

COTTON LAND, near Tallahassee, Florida, 25th Nov., 1844.

DR. MITCHELL, *Dear Sir*:—I write to ask the favor of you to

do me the kindness to inform me as early as convenient the amount of Col. Harry Doggett's indebtedness to you for which I am his security. Please let me know the amount principal and interest, either up to the 1st next month, or 1st day of January. It is now near eight years since I became Col. Doggett's security for this money, and it has been some years since I signed the note you now hold, and I learn he has not paid the first cent on it since I signed it last with him. I think it is time he was paying it. I have been his security and waited patiently for him to pay you, till I begin to think patience is no longer a virtue. If a man of Col. Doggett's estate cannot pay a debt of that amount in eight years it is hard to tell how long a time it would require. He is now good I expect and I say to you that unless Col. Doggett give you other security to satisfy you and release me, I wish you to proceed *forthwith* to make your money out of Col. Doggett's estate. I have no wish to have Col. D. pushed, and my permitting the note to run so long is I think satisfactory proof of that fact. But one thing is certain, I must have my name off that note if I can get it off. I would be very glad to see you. It is but little out of your way to come to my *Cabin* on your way from Thomasville to Tallahassee. Come and spend a night with me or longer time. I would be much pleased to see you at my house and we could go and see Col. Doggett, who resides within 3 miles of me and I think some satisfactory arrangement might be made. I have no doubt he could give you other names fully as good, or better than mine. You were so kind as to tell me in the last conversation we had upon this subject, that when ever I desired it you would proceed to collect your debt, and I now say, that unless Col. Doggett will make some arrangement satisfactory to you, by which the present note you hold can be destroyed, and I relieved from all responsibility by his paying or renewing the note with other securities, I shall certainly wish you to proceed as *quick as possible to collect your money from Col. Doggett*, for I acknowledge to you I am somewhat uneasy about it. I have a wife and three children dependent on me who have stronger claims than any other person on me, and with good fortune and health, I have no fear but I can always support them comfortably and decently, and I do not wish them brought to penury and want by my imprudence, nor by having to pay other persons debts. I believe him to be an honest and honorable man and willing to pay his debts and if so he can do it for he has about 225 negroes, 3000 to 4000 acres of

as fine land as any in the country with a large quantity of stock, &c., besides the present crop, which I suppose will be 600 bales (or more) cotton and some corn to sell. But notwithstanding all this I think you will agree with me that eight years is long enough to be security to any one man *for the same debt,* and more particularly, when the debt is constantly growing larger. I owe but little myself and am anxious to be relieved from any responsibility for the debts of others, for 'tis about as much as I can do these times to make a decent competency by industry and prudence, without having others to work for. An early answer will greatly oblige, dear sir, Very respectfully yours most ob't

J. W. COTTEN.

Addressed and postmarked,

For Dr. Isaac W. Mitchell,

Thomasville, Geo.

Tallahassee Flor., Dec. 3. Paid 10.

He then gave in evidence the original præecipe ordering suit *vs.* Doggett & Cotten (which abated against Cotten by his death) to prove the date of the commencement of said suit, to wit: "Isaac W. Mitchell *vs.* Henry Doggett and John W. Cotten. Action of trespass on the case upon promises. Damages $32,000. Issue writ returnable to next term, January 7th, 1845.

BROCKENBROUGH, P. Q.

To Clerk of Leon Superior Court."

Endorsed, "Filed January 8, 1845.

N. P. B., D. C."

No further or other testimony was introduced on either side and the cause having been fully argued, the court instructed the jury as follows, to wit: "That the plaintiff did not ask a recovery upon the special count on the note, having conceded that he could not recover thereon, but had sought to recover upon the money counts. Conceding that the plaintiff could not recover against the defendant on the note as security to Henry Doggett, the court had no difficulty in charging the jury that he could not recover on the money counts. The contract declared upon was manifestly a contract of suretyship, admitted by the parties in the pleadings in the case and to which evidence has been adduced on both sides as well by the plaintiff as the defendant. In such case any concealment from the surety, any withholding from him of the material part of the principal contract would render the engagement of suretyship a nullity. It was void.

There was no valid contract whatever. Now if the contract of suretyship is gone what remains against Cotten. He bought no land of Mitchell nor of Flake. He borrowed no money but was surety only of Doggett. His contract is a contract of suretyship and nothing else. If his liability is not fixed on that, he is altogether discharged. The plaintiff cannot fall back on the old note, for that was given up and cancelled, that note was extinguished and it is here produced as the property of Doggett in whose possession it is. Cotten cannot be held bound for any original consideration, because it is shown that he was always surety. No consideration moved between Mitchell and the defendant. He became Doggett's surety because of his friendly feelings for Doggett. In this view the existence or non-existence of usury on the note sued on, has nothing to do with the defence set up, except so far as the contract as known to Cotten may have been changed in that respect between Doggett and Mitchell, and if the jury believe such change was made without the knowledge or consent of Cotten, then the law declares the contract of suretyship void and the plaintiff cannot recover on the note, and not recovering on the note, he cannot recover on the money counts.

The Plaintiff's counsel then moved the court to instruct the jury as follows, to wit:

First, That the plaintiff may recover the consideration given for any usurious note or security on the money counts, provided there is no usury in the consideration itself.

Second, If it is conceded here or proved or believed by the jury from the evidence that the note of the 1st January, 1839, contained no usury and was a valid contract in all respects and was the consideration of the subsequent usurious contract, there is no law to prevent the recovery of that debt of 1839, or any portion thereof under the money counts.

Third, That our statute only avoids the interest on a usurious contract and has nothing to do with interest or principal of a prior contract between the same parties, though such contract may be used as the consideration for a usurious contract.

Fourth, The interest of an original valid contract is no more affected by a subsequent usurious contract than the principal, and the latter is not affected.

Fifth, Two joint and several makers of a negotiable promissory note, are both principals and stand upon the same footing towards a

bona fide holder, and the law presumes him bona fide until the reverse be shown.

Sixth, The party setting up fraud, concealment, or giving time without consent of surety, or other matter in discharge of surety, must prove his allegations in discharge of himself.

Seventh, If the party surety had proved any different contract for interest on the last note than appeared upon the face of the instrument signed by the party, and the principal was to pay 2 1-2 or more per cent more than the surety was bound for, and such arrangement was concealed from the surety, yet that would not prevent the plaintiff from recovering on the original consideration.

Eighth, That both Cotten being bound in the first instance and the giving of the note with the usurious premium being a subsequent and distinct transaction although the note declared on or any part thereof might be void, the pre-existing debt may be recovered on the money counts.

Ninth, That if the jury are satisfied that 12 1-2 per cent was taken or agreed to be taken by Mitchell and a new note taken which included all interest for which Cotten was then bound and this was endorsed on Cotten's note this was for the advantage of Cotten and he is responsible on the note.

Tenth, By our law if the jury find usury they can only deduct interest from the time usury commences.

Eleventh, That when a party recovers on the money counts it is upon the original consideration, not the old notes or cancelled notes, or any other evidence of debt or securities, but the debt itself due precisely as if no note had ever been given; and where two or more are jointly, validly bound, the law implies that the consideration passed to both of them.

All and singular of which several instructions from one to eleven inclusive the court refused to give; and thereupon instructed the jury "that the plaintiff was not entitled to recover," to which several overrulings as hereinbefore set forth, and refusal to give the instructions prayed, and the instructions given, the plaintiff by his Counsel excepted, and prayed that this his bill of exceptions might be signed and sealed by the court which was done.

The jury returned a verdict for the defendant upon which judgment was entered, and the plaintiff in error now seeks to reverse that judgment upon the following grounds to wit:

Isaac W. Mitchell, vs. Frederic R. Cotten, Executor of John W. Cotten.

First, The Court erred in overruling the plaintiff's demurrer to the defendants sixth plea.

Second, The Court erred in admitting the testimony of Henry Doggett taken under commission (being his answers to 8th, 9th, 12th, 14th and 15th interrogatories) to be read in evidence to the jury against the objections of the plaintiff.

Third, The Court below erred in the instructions given by the Judge to the jury.

Fourth, The Court below erred in the refusal of the Judge to instruct the jury as prayed by the plaintiff's counsel.

As to the first error assigned, viz: That the Court erred in overruling the plaintiff's demurrer to the defendants sixth plea, it is sufficient to observe, that the judgment upon said demurrer was *respondent ouster*, and that the plaintiff (as appears by the record) answered over by filing his replication to that plea and thereby waived the demurrer thereto. On overruling a demurrer if the demurrant resorts to ulterior pleadings on the same point the demurrer is waived: Burdet *vs.* Burdet, 2 A. K. Marsh, 143. Morrison *vs.* Morrison, 3 Stewart's Reps. 144. Breese, 19.

The same doctrine was maintained by this court in the case of Mitchell *vs.* Executor of Chaires at the present term. A decision overruling a demurrer cannot be revised, if afterward it is withdrawn and issue joined to the country. Acre *vs.* Ross, 3 Stewart, 288. Trigg *vs.* Shields, Hardin 168. A plaintiff cannot demur and reply to the plea, Riley and another *vs.* Harkness, 2 Blackf. 34. Harris *vs.* Weaver, 1 Blackf. 77 (and authorities there cited) Stephens on Pl. 296.

The second error assigned, viz: That the court erred in admitting the testimony of Henry Doggett, &c., is attended with more difficulty. This objection arises under the provisions of the 4th Section of the act of February 12th, 1833, "regulating the rate of interest," Duval's Comp. 79. Thompson's Digest, 235, No. 5, which declares "that in all cases whatsoever, whenever any suit or action shall be brought in any court of record in this State, touching or concerning any usurious bond, specialty, promise or agreement, the borrower or party to any such usurious bond, specialty, promise or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence. Provided, that if any person against whom such evidence is offered to be given, will deny upon oath to

be administered in open court, the truth of what *such witness offers to swear* against him, then such evidence shall not be admitted." Of the reason which induced the Legislature to make this provision we are not advised. No preamble is annexed to inform us. It probably grew out of the distressing conflict of opinion as to the competency of parties to written instruments when called as witnesses for the defendant. In Walton *vs.* Shelly, 1 Term Reps. 300, it was laid down by Lord Mansfield as a general rule of evidence that a party shall not be received as a witness for the purpose of invalidating an instrument to which he had set his hand, and although this case was (in Jordaine *vs.* Lashbrooke, 7 Term Reps. 601,) only ten years after its promulgation, entirely overruled by Lord Kenyon at the head of the court by which, under the influence of Lord Mansfield, it had been originally pronounced, it has been followed by the Supreme Court of the United States and the courts of several of the States, while it has been laid aside or never recognized as law in a large majority of the States of the Union, as appears by authorities collected in the notes to the case of Bent against Baker, 2 Smith's Leading Cases, 87, 88, and 1 Greenleaf's Evidence, 430, in note.

The rule laid down in Walton and Shelly is broad enough to comprehend all instruments of writing of whatsoever description, yet except so far as it may be comprised in the common law doctrine of estoppel, it has been every where decided to apply only to those instruments negotiable in their character. Pleasants *vs.* Pemberton, 2 Dall. 196. Morris *vs.* Shippen, 2 Binney 165. McFerror *vs.* Powers, 1 Sergt. and Rawle 107. Bragg *vs.* Phoenix In. Company, 3 Wash. C. C. Reps. 5. Loker *vs.* Haynes, 11 Mass. 498.

And in order that the rule should take effect, the instrument must not only be negotiable *but actually have been negotiated.* 1 Green. Ev. 430, Sec. 385. 2 Smith's Leading Cases, 87, 88. If the suit be between the original parties, a witness may give evidence tending to invalidate a bill or note on which the action is brought, although his name is thereunto affixed, and thus one of the two joint makers of a promissory note is a competent witness for the other to all intents, in a suit on the note wherein the payee is plaintiff. Fox *vs.* Whiting, 16 Mass. 120. This suit having been brought by the payee both of the note of 1839 and that of the second day of January 1841, and neither of them having been negotiated, it is evident that the witness would have been competent upon general principles

under the restrictions imposed by the courts which have adopted the rule of Walton vs. Shelly, and being thus competent the question occurs does the Statute narrow the rule as to the admission of the testimony. That the reason before referred to may have had weight with the Legislature in the enactment of this provision we have no doubt. We think however that the intention was not to abridge but to enlarge the rule of evidence so as to let in the testimony of a party to the suit, if he were the borrower or party to the usurious bond, &c.

To him the Statute gives a privilege not conferred by the Common law. But in order to avail himself of it he must come into open court and "offer to swear," and then if the person against whom such evidenee is offered to be given, will there deny upon oath the truth of what such witness offers to swear against him, then such evidence shall not be admitted. The terms "the witness offers to swear," "evidence offered to be given," import a voluntary swearing by one who cannot be compelled to testify, and while the Statute confers upon a party to the suit this privilege when he happens to be a party to the usurious bond, &c., we cannot suppose that the Legislature intended to abridge the common law right of a party to the suit, to the testimony of a witness who is not a party to the suit, but who may have been a party to such usurious bond, &c., or to prevent the defendant in such a case from availing himself of the statutory mode of taking his testimony by deposition.

On the contrary, we think the act is intended to prevent such testimony from being excluded. The provisions of the second section of the act seem to favor this construction, and any other would involve the absurdity that while the Statute expressly extends the rule so as to admit the testimony of a party to the suit in his own behalf, when the party against whom such tesimony may be offered will not on oath deny what such witness offers to swear, it would narrow the rule so as to put it effectually in the power of the party to shut out the testimony of a witness otherwise in all respects competent, by thus denying what his antagonist might offer to prove by him. We are of opinion therefore that there was no error in admitting the testimony of Doggett. At all events the plaintiff has no cause to complain. He had the full benefit of a cross examination and besides, it does not appear that he was in court ready (if the witness had been there) to deny on oath the testimony he gave.

The plaintiff at the trial of the cause in the court below abandoned

the first count of his declaration which (as we have seen) was upon the note of the 2nd of January, 1841, and sought to recover only the original consideration, and the first and most important question presented for our consideration is whether he is entitled to recover at all. It is contended on behalf of the defendant that his contract was that of surety only, and that he was absolutely discharged by the agreement of the 2nd of January, 1841, above set forth, and that if he was not discharged by that agreement, there was no consideration moving from the plaintiff to him. That the original consideration of the contract was the price of land bought by Doggett of Flake, and the plaintiff having abandoned the note set out in the first count of his declaration cannot recover. The position that Cotten was surety is fully sustained by the pleadings and proofs in the case. But it does not we think follow that he was therefore discharged.

The rule undoubtedly is that a surety is not to be held beyond the precise terms of his contract. That the creditor has no right to increase his risk without his consent. But in Tudor *vs.* Goodloe, 1 B. Monroe's Rep. 324 as cited in 2 Vez. Jun. 540 in note by Charles Sumner, it was held that "a promise by the principal to pay usurious interest in future for forbearance (the precise case before us) is *void* and does not operate to exonerate a surety;" and this is in accordance with general principles. The drawer of a bill of exchange is as much a surety as the endorser of a promissory note. Arundle Bank *vs.* Gable, Chitty on Bills, 239 note, was an action by the endorsee against the drawer of a bill. The defence was that when the bill became due the acceptor applied to the holder for time and this was granted on condition that the interest should be allowed him. The plaintiff had a verdict and a motion for new trial was denied. The court said that as *no fresh security* was taken from the acceptor, the agreement to wait *without consideration* did not discharge the drawer because the acceptor might notwithstanding such agreement be sued at any moment and the understanding that interest should be paid by the acceptor makes no difference. Ch. Justice Best in the case of Philpot *vs.* Briant, 4 Bing. Reps. 717 vouches for the correctness of the case of the Arundle Bank *vs.* Gable, and very distinctly reiterates the same principle. Philpot was holder of a bill of exchange and brought his action against the drawer who defended on the ground that time had been given to the defendant's executrix without the *knowledge* or consent of the drawer. The holder promised to delay a reasonable time provided the interest

was paid, and pursuant to this agreement interest was paid out of the *private income* of the acceptor's executrix. Still it was held in that case that the drawer who was declared to have the character of surety was not discharged by the delay. And to the same effect is the case of Fulton and Matthews *vs.* Wedge, 15 John. Reps. 433. Where a security which is given on a loan of money is void at its creation, no subsequent agreement of the borrower to pay usurious interest or premium for the further forbearance of the loan, will invalidate the original security. But the *subsequent usurious premium will be void.* Crane *vs.* Hubbell, 7 Paige's Reps. 413. Mitchell *vs.* Doggett, 1 Florida Reps. 374, 376, 377.

Where a note not tainted with usury has been *given up* and *cancelled* on being made the consideration of a usurious contract or note, which latter has been avoided as usurious: Held that the note cancelled on the consideration of this may be recovered upon under the common counts. Edgdell *vs.* Stanford, 6 Vermont Reps. 551. This is upon the ground that the latter contract is void and therefore does not supercede the former. So where a note is given in renewal of a former note and a premium or interest above seven per cent is exacted for the renewal (the Supreme Court of New York held that) the note was usurious and *void,* although a separate note (as in this case) was given for the premium, but that the old note was not thereby affected or destroyed. Swartwout *vs.* Payne, 19 Johns. Reps. 294.

The principle to be extracted from these cases is, that the usurious contract being *utterly void,* does not extinguish or affect the original valid contract. In other words that a *non entity* cannot extinguish an entity, and the case of Robinson *vs.* Bland, 2 Burro 1077 is founded on the same principle. That was a suit on a bill exchange, the consideration of which was partly money lost at pl and partly money lent to play with. The former being a gami debt was void. The latter not. Part of the consideration for wh the bill was given being void, the whole bill was declared void, the plaintiff was allowed to recover for the money lent. And same doctrine is laid down by Burge on Surety where he treat novation at page 167. He says "There must be two valid sisting obligations, the one to be extinguished, and the other substituted for it. Hence if at the time of the new obligation former constituted no debt, or if on the other hand, the *new obli* there was no novation." The effect of novation is

the prior obligation together with its accessions and privileges is destroyed, but novation will not take place if the second obligation be void. Ibidem 171. It is contended on behalf of the defendant in error that the contract in this case (although void as to Cotten) was valid as to Doggett, for say his counsel, recovery has been had upon it, alluding doubtless to the case of Mitchell *vs.* Doggett before referred to. In that case, however, the precise point we have been here discussing was not presented, but on reference to that case it will be found that the declaration (as in this case) contained a special count upon the note and the usual money counts. 1 Florida Reps. 365. And at page 375 the court said that the note of 1839 was clearly upon a good and valid consideration, and if that note had been sued on we are not prepared to say but it would have remained unaffected by any subsequent usurious contract. And at page 377 the court cited with approbation and *italicized* the following remarks of Judge Spencer in the case of Swartwout *vs.* Payne above cited. "But it is equally certain that if on receiving the new security a new rate of interest above seven per cent was received for forbearance, the new securities are void by the statute, and in this view it is immaterial whether the illegal interest was reserved and made payable by a distinct note or was incorporated into one note. They are considered as one assurance, *are all void* into whatsoever hands they may come." "The note (said Judge Spencer) being a nullity according to the case of Markle *vs.* Hatfield, 2 John. 455, the plaintiff had a right to sue on the original contract." Thus indicating very clearly the views it entertained of the state of the contract, and of the rights of the plaintiff in regard to it. We cannot recognize the distinction taken for the defendant in error that the new contract was void as to the surety, and valid as to the principal, but consider them both as standing on the same ground in relation to that matter.

If the new contract was good as to Doggett it could only have been so for the original consideration and any interest that may have accrued thereon before the usurious contract was made, and if good to that extent against Doggett, it was to the same extent good against Cotten. We therefore proceed to enquire whether the plaintiff is entitled to recover in this action upon the original consideration of that contract; and upon this point we should deem the case of Mitchell *vs.* Doggett before cited, as conclusive, but for some objections which have been presented in this case, which were not presented

in that. And one is, that there was no consideration moving from Mitchell to Cotten. As to this we remark, that the words, "for value received" in the note of 1839 (as well as in that of 1841, both of which were) offered in evidence, import a consideration. Mandeville *vs.* Welsh, 5 Wheat. 277, 4 Peter's Cond. Reps. 645, and authorities there cited. But besides this the evidence in the case shows that the notes of Doggett and Cotten to Flake transferred to Mitchell, were given up by the latter and cancelled, and the note of 1839, for $13,185 (which was valid,) was substituted for them—a transaction which we think was a good consideration to both Doggett and Cotten. The extended credit given was surely a valid consideration to Doggett the principal, and whatsoever is a good consideration to support the promise to the principal, will sustain the promise to the surety. Hughes *vs.* Wheeler, 8 Cowen, 83. Pritchell et al, *vs.* the People, 1 Gilman Rep. 530. Leonard *vs.* Vredenburg, 8 John. 29. The United States *vs.* Linn, 15 Peters 290. In this last case the court say: "There was no necessity for any consideration passing directly between the plaintiffs and the sureties. The consideration which supported the contract of Linn (the principal) support that of his sureties."

"The whole being one entire and original contract and not collateral on the part of the sureties, the consideration received by Linn was sufficient to support the contract on the part of his sureties." And 8 John. Reps. 37. Cro. Eliz. 137 and 3 Burr. 1886 are cited. Here the undertaking of the surety was direct *not* collateral.—Much stress was laid by the Counsel for the defendant in error, at the argument of this case, upon the fact that the note of $13,186 was given up when those of the 2d of January, 1841, were taken by the plaintiff. It is said that it was cancelled, destroyed, and that the plaintiff cannot now rely upon it. But in Olcott *vs.* Rathburn, 5 Wendell 492, the court held that "the mere giving up a note is no satisfaction of it. It is not an act which of itself affects the validity of the note. It seems (continued the court) from the case of Russell *vs.* Hackley, 6 Term Rep. 12, that it was the common practice in London to give up a bill of exchange upon receiving a check on a Bank therefor, and it does not appear objectionable so far as the acceptor is concerned. The maker of a promissory note stands in the relation of an acceptor of a bill of exchange. There can be no doubt that a note thus parted with is given up un-

der the expectation that the check will prove to be a satisfaction, but this does not settle the question."

When a creditor receives a note or check for his debt, he expects confidently that the note or check will turn out to be a satisfaction of his demand, yet if such note or check is dishonored he may sue on the original debt, and is not concluded by his receipt, and 1 Cowen 290, 9 Johns. R. 310 are cited. The endorsee of a note may in New York recover on the common money counts in an action against the maker, although the evidence shows no money transaction between them, but the plaintiff is suing as the mere agent of the party in interest. Olcott *vs.* Rathburn, 5 Wendell 490. And in Massachusetts it is held that an endorsee of a note may maintain an action for money had and received against the maker, though the maker signed it merely for the accommodation of the payee and receive *neither money or any other consideration* for signing it.—Cole *vs.* Cushing, 8 Pick. 48.

Another objection yet remains to be noticed. It is that the original notes to Flake were for land and therefore the plaintiff cannot recover in this case on the common counts. But the notes to Flake, it seems evident, were intended to be and were extinguished by the transaction above mentioned, and the note of 1839 is the consideration of that of 2nd January, 1841, which proved to be tainted with usury. The consideration is clearly shown by Cotten's letter set out in the record. If however, land is to be deemed the consideration of the note of 1839, because it was the consideration of the Flake notes, (but we do not so deem it) still there are not wanting authorities which go far to show that the plaintiff may recover on the common counts. In the case of Dearborn, Treasurer, &c., *vs.* Parks, 5 Greenl. Reps. 81, it was held that "where one undertakes to pay the debt of another and by the same act also to pay his own debt, which was the motive of the promise, this is not such an undertaking to pay the debt of another as is within the statute of frauds, and therefore it is not necessary that it should be in writing, and though the consideration of such promise *was land*, yet the party to whom the debt was to be paid may recover the amount in an action for money had and received." This must have been upon the principle that the price of the land was money in the hands of the purchaser and the court in that case said, "If the defendant did not actually receive money, he received that for which he agreed

to pay a certain sum of money, part of which was appropriated in his hands to pay the plaintiff, and Floyd *vs.* Day, 3 Mass. Reps. 403, and Randall *vs.* Rich, 11 Mass. Reps. 498 are in point. In the last case (which was assumpsit for money had and received) the court say "although land is taken, it is taken at money's worth and the debt which might have been exacted in money at all events, has been discharged. This is sufficient to support this doctrine." But Mitchell bought of Flake the notes of Doggett and Cotten (and in the absence of proof to the contrary must be presumed to have paid money for them) after which he gave up to Doggett these notes of Doggett and Cotten, and took therefor a new note signed by both, given them further time within which to pay. May not this be considered in substance and effect as a loan of the money to Doggett, or as money had and received by him to the use of the plaintiff for the payment of which Cotten was surety? Doggett it is to be presumed understood it as a loan. In his answer to the 8th interrogatory he says: "The real bargain between Mitchell and myself at the time of making said note (the note of $15,955,) was that Mitchell was to receive *for the loan of said money* 12 1-2 per cent," and if Doggett at this time understood the arrangement as *a loan of money* it may reasonably be suposed that the parties so understood the matter when the note for $13,186 was made. It is worthy of remark here, that there is nothing in the record to show that at the time of this transaction Mitchell knew that Cotten was a mere surety on and not a principal in these notes, or that he (Mitchell) was ever informed that the notes to Flake were given for the price of land bought by Doggett. The consideration to Doggett (is as we have seen) a sufficient consideration to Cotten. Mitchell again gives up this last note to Doggett and takes a note signed by both Doggett and Cotten which was proved to be usurious. Is there any reason in justice or equity why he should not recover the original consideration (so far as it is not affected by the usury) under the common counts? We think not and that the law does not forbid it. In Clark *vs.* Martin, 2 Lord Raym. 758, Holt, Ch. Justice, expressed his disapprobation of declaring on promissory notes before the statute (of Ann) as if they were within the custom of merchants and assigned as a reason "beause there was so easy a method as to declare upon a general *indebitatus assumpsit for money lent.*" The same he says is laid down in 12 Mod. 380, and 1 Burr, 1525.— Lord Mansfield says: "I do not find it any where disputed that an

action upon an *indebitatus assumpsit* generally for *money lent* may be brought on a note payable to one *or order,"* and it was so holden in Smith *vs.* Kendall, 6 Term Reps. 123. The notes to Flake which were taken up when the note of 1839 was given were negotiable. In Beardsley *vs.* Root, 11 John. 523, Van Ness, Justice, in delivering opinion of the court remarks that the general rule indisputably is that money had and received cannot be supported unless the defendant has actually received money. It has however (he says) been held in the English Courts that taking negotiable paper is equivalent to a receipt of money and although we have never sanctioned that doctrine by any express decision yet in the case of Cummings *vs.* Hackley, 8 John. 206, the court seem to intimate their approbation of it. And on reference to that case we find it sustains him as to the action of the Supreme Court of New York. And Pickerel *vs.* Banks, 13 East. 20, and Fox *vs.* Cutworth, 4 Bing. 179, sustain him as to the English Courts. Tatlock *vs.* Harris, 3 Term Reps. 174, was an action by the endorsee of a bill payable to a fictitious payee against the acceptor who was also one of the drawers. The declaration contained counts for money paid and money had and received. It appeared upon the evidence that the defendant was indebted to one of the endorsers, and sent him this bill for which he was credited in account, and that the plaintiff paid that endorser the value of the bill, and upon demurrer to evidence the court held that the plaintiff was entitled to recover under the counts for money paid, and money had and received, and he had judgment accordingly. And Vere *vs.* Lewis, Ibid. 182, was a similar action to that of Tatlock *vs.* Harris, except that the defendant was not one of the drawers and there was *no evidence* that he *received any value for the bill.* In neither of these cases had the defendant actually received any money of the plaintiffs and a numerous class of cases involving the same principle might be cited, but these are deemed sufficient.

In the case of Hughes *vs.* Wheeler, 8 Cowen Reps. 81, 84, the question was whether the plaintiff was entitled to recover under the common counts the amount of the original note, for which the note declared on (and which was proved to be usurious) was given. The objection made to the recovery was that the note itself having been destroyed by the parties did not exist and could not be used as evidence of money had and received by the defendant and the evidence showing that it was given for the debt of a third person, there was

no cause of action against the defendant prior to and independent of the giving of the note (the precise objection made to such recovery in this case.) But the Court said "the destruction of the note was a matter of no importance. The note on which the suit was brought having proved to be usurious, the plaintiff resorted, as he had a right to do, to the consideration of the note so far as it was not affected by the usury. What was that consideration. It was the old note which was not attempted to be impeached, but which on the contrary was shown to have been given for a legal consideration and a premium of five dollars for forbearance. That a promissory note is evidence of money had and received by the maker from the payee and may be used as such upon the money counts is admitted. It is then in principle the common case of an action for money had and received, &c., supported by proof of a promissory note which is shown to have been destroyed by accident or misapprehension, which does not amount to a legal satisfaction of it."

Another objection to the recovery of the plaintiff on the common counts (in that case) was that the old note was not given for a pecuniary consideration, and the defendant below had offered to show that the note was given for the debt of a third person, which debt was not for money, but for land sold by the plaintiff to him. The evidence was excluded and the objection overruled. On error brought, Sutherland, Justice, thought in this the Court erred, but Savage, Chief Justice, and Woodworth, Justice, held the note to be conclusive, and the judgment was affirmed. This case is directly in point in many respects. The note (as in the case under consideration) had been given up and cancelled. The note taken in its place proved to be usurious. The note given up and destroyed was given for the debt of a *third* person, which debt was *for land.* Here the debt was Doggett's and originally for land, and Cotten was Doggett's surety, not only on the last note, but on the notes to Flake, and the note of 1839 was submitted for the Flake notes.

We fully recognize the rule asserted by Lord Ellenborough cited by counsel for the defendant in error, that "the contract of a surety is *strictissime juris,*' and that he cannot be held beyond the precise terms of his agreement, as laid down by the authorities generally. Nor has the case of Wells *vs.* Girling, 8 Taunton, 737, cited on behalf of defendant in error in which it was held by the Court of Common Pleas in England "that an action cannot be supported upon the money counts, against one of the makers of a promissory note

who signed it as a surety for the other maker." escaped our attention, but finding the principles it asserts opposed by a number of American cases decided by Courts for whose opinions we have the highest respect, we doubt its correctness. And moreover the Court in that case based its decision mainly upon the fact that the proofs showed that "there was no antecedent debt." Had it been otherwise (as in the case at bar) we believe from the language used by Chief Justice Dallas in that case, the decision would have been different. We therefore see no reason why, in this case, the surety should not be held according to the precise terms of his agreement (except so far as the usury may effect his liability to pay interest) and we hold him no further. On the contrary we declare the contract, by which it was attempted to hold even his principal further, in that regard null and void. If the views that we have taken of this case be correct (and from the best consideration that we have been able to give it, we believe them to be so,) the Judge erred in his instructions to the jury that "plaintiff could not recover on the money counts," that "there was no valid contract whatever—that the plaintiff cannot fall back on the old note—that the existence or non-existence of usury on the note sued on has nothing to do with the defence set up, except so far as the contract as known to Cotten may have been changed in that respect between Doggett and Mitchell—that the plaintiff cannot resort to the money counts, and that he is not entitled to recover," and in refusing to give the first, sixth, eighth, and tenth instructions as prayed by the counsel for the plaintiff, and the seventh so far as it asked the Court to instruct the jury that the plaintiff could recover the original consideration.—And the judgment must therefore be reversed, and the cause remanded for further proceedings.

But inasmuch as it very clearly appears, from the testimony in the case, as disclosed by the bill of exceptions, that on the second day of January, A. D., 1841, an agreement was entered into by and between the plaintiff in error, (who was also plaintiff below) and the said Doggett, by which the latter engaged to pay interest at the rate of two and one half per cent beyond the then legal rate of interest for the forbearance of the debt of $15,955 in the first count of the declaration mentioned, the contract was consequently, from that time tainted with usury, and the interest on the same is thereby rendered entirely void, according to the principles decided and settled in the case of Mitchell against Doggett at the last term (before cited)

which we have again examined and with which we are well satisfied. And consequently the defendant cannot be charged with any interest since the said second day of January, A. D., 1841. For notwithstanding the plaintiff at the trial of this cause in the court below abandoned the first count of his declaration, and rested his case upon the common counts, yet the usurious note being there, in bold relief staring us in the face, and the evidence in the case most conclusively proving the usurious contract upon which it was made and delivered to the plaintiff, we cannot lose sight of or disregard it, or place him in a better condition in regard to the defendant, whose testator was only a surety than that in which he was placed at the past term in his suit against Doggett the principal, for the amount of this same identical debt, except so far as the proof as to the time of the commencement of the usury in this case may differ from the testimony in that case in relation to this matter. To do so would put it in the power of a party at all times by getting a surety to his usurious contract to avoid the statute to the extent at least of the legal rate of interest.

The fourth section of the act above cited "regulating interest," Thompson's Digest 235, No. 4. Duval's Comp. 79, sec. 2, provides "That when any note, notes, bond or bonds, shall be upon or on account of any usurious contract, the interest on the same shall be *void* and the obligor or obligors forever exonerated from the payment of the same." It is not the usurious interest merely, but the entire interest which may have accrued after the date of the usurious contract from the payment of which the obligor is exonerated.—Now Cotten was a party to this note of $15,955 on which the usurious interest was (by the agreement between the plaintiff (Mitchell) and Doggett) to be paid. He was one of the obligors. The usurious interest it is true, was secured by a separate note which was not signed by Cotten, but was signed by Doggett, and it has already been decided in the case of Mitchell *vs.* Doggett that they are *one assurance.* This $15,955 includes the $13,186 the sum secured to be paid by the note of 1839, and the usurious interest was to be paid on the whole sum. The interest on the whole was therefore void by this usurious agreement, from the time when the usury by that agreement commenced, which Doggett expressly says was on the 2d of January, 1841. But this is not all. The 7th section of the same act made it the duty of the Judges of the Superior Courts to charge the Grand Juries of their respective counties, &c., to

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present all and every person who should violate the provisions of this act, &c., and on every presentment it was made the duty of the District Attorney to prosecute the party presented, for the *amount of interest* by this act forfeited, either in an action of debt in the name of the Territory, or upon information filed, and these duties now devolve upon the Judges and Solicitors of the respective counties of this State. To render judgment for the interest therefore would be to enable the plaintiff to recover money forfeited to the State upon a penal statute, and for the recovery of which it would seem to be the duty of the Judge of the proper Circuit, to charge the Grand Jury to present him. The act of 14th March, 1844, sec 2, pamphlet laws, page 53, amending that act is equally penal and very forcibly illustrates the settled policy of the State on this subject. See Thompson's Digest, page 234, 235, No. 2. With the statutory provision before us we feel ourselves precluded from allowing more to be recovered (in such a case as this) than the amount of the original debt that may be proved with legal interest thereon up to the time when the usurious contract was made.

We have looked into the other instructions asked by the plaintiff below and deem it proper to say that the second appears too broad. It should have excepted all the interest since the said second day of January, 1841. The third and fourth seem to be objectionable for similar reasons. The fifth was calculated to mislead the jury who from the testimony in the case were the proper judges of the question (if it were at all material) whether Cotten was a surety or a principal. The ninth and eleventh (with the exception of the last clause of the latter which might with propriety have been given) seem to embrace only abstract propositions with which the jury had nothing to do.

The judgment is reversed and the cause remanded to the court below for further proceedings in accordance with this opinion.

Per Curiam.

DAVID BROWN, *vs.* JOSEPH F. C. HARLEY.

A *scire facias* to revive a judgment is not an original but a judicial writ, founded on some matter of record to enforce execution of it, and properly speaking it is only the continuation of an action.

In *scire facias* upon judgment a declaration is not necessary.

It is a presumption of law that every thing done in a Court of record is *regularly* done, unless the contrary appear upon appeal or writ of error.

In *scire facias* before the Circuit Courts of the State to revive a judgment rendered in a Superior Court of the Territory, a suggestion to the Superior Court in these words 'and now in behalf of the said Joseph F. C. Harley it hath been understood in the said court that although the judgment thereof is given, yet execution for, &c., remains to be made,' &c., furnishes no warrant or authority for any proceedings in the *Circuit* Court.

The judgment in this case being for a specific sum in damages as prayed in the writ and for cost is erroneous. The judgment should have been "Let execution issue according to the force and effect of the judgment aforesaid by default of D. B. defendant."

Writ of Error to Leon Circuit Court.

The action below was by *scire facias,* to revive a judgment rendered in the late Leon Superior (Territorial) Court on 21st November, 1842, in favor of Joseph F. C. Harley, and against David Brown, for $1,483. The *scire facias* is in these words:

"THE STATE OF FLORIDA,

To the Sheriff of Leon county—GREETING:

Whereas at a Superior Court of the Middle District of the Territory of Florida for the county of Leon, begun and held at the Court House in the City of Tallahassee, on Monday the 14th day of November, 1842, and continued till and after Monday the 21st November, 1842, a certain Joseph F. C. Harley, on the said 21st November, 1842, by the consideration of said court, recovered against one David Brown a judgment for the sum of fourteen hundred and eighty-three dollars, the damages which the said Joseph F. C. Harley had sustained by occasion of the non-performance of certain promises and assumptions by the said David Brown to the said Joseph F. C. Harley lately made, and his costs by him about his suit in that behalf expended, as appears of record. And now, on behalf of the said Joseph F. C. Harley, it hath been understood

in the said court, that although the judgment thereof is given, y execution for the damages and costs aforesaid still remains to made for him—wherefore the said Joseph F. C. Harley ha besought that a proper remedy be granted in this behalf. Y are, therefore, hereby commanded that you make known to t said David Brown, that he be and appear before the Circuit Cou of the Middle Circuit of the State of Florida for Leon county, the Court House in the City of Tallahassee, on the fourth Mond of the present month—that is to say, on the 27th day of April, D. 1846, to show, if he hath or can say any thing for himself, w the said Joseph F. C. Harley ought not to have his execution again him for the damages and costs aforesaid, according to the force a effect of the recovery aforesaid, if he, the said David Brown, sh think fit; and further to do and receive what the said court sh then and there consider concerning him in this behalf, and ha then and there this writ. Witness," &c.

This writ was served, and at the appearance term, (May, 184(the defendant moved the court for a rule upon the plaintiff to file declaration in this case, on or before the first day of the next ter and upon default, that the action be dismissed, according to t Rules and Practice of the court. This rule was refused, the *sc facias* being deemed a sufficient declaration in practice, if the plaint wished to rely upon it as such.

At the November term, 1846, (the defendant having filed plea,) the following judgment was rendered: "This day came t plaintiff by his attorneys, and the defendant having filed no pl herein, and having been duly warned and not appearing, on moti of the plaintiff by his attorneys, it is considered by the court, th the said plaintiff may have execution against the defendant f fourteen hundred and eighty three dollars, the damages and t costs in the writ aforesaid specified; and, also, that the plaint recover against the said defendant his costs, by him expended suing forth and prosecuting this writ, and the said defendant mercy, &c."

To reverse this judgment, the defendant prosecuted his writ of er in this court, upon the following assignment of errors:

I. That the court erred in refusing to require the plaintiff Jose F. C. Harley to file a declaration in *scire facias* in this case, as shown in bill of exceptions.

II. That the court erred in requiring defendant to plead to the writ of *scire facias* as a declaration.

III. That the court erred in giving Judgment for plaintiff below upon the said writ of *scire facias*, because the said writ of scire *facias* is altogether irregular and insufficient in this:—

1st. That said *scire facias* doth not allege that the judgment set forth was regularly rendered.

2nd. That said *scire facias* doth not allege that suggestion hath been made to Leon Circuit Court, which issued said writ, that execution remains to be made, but alleges that suggestion of that fact hath been made to Leon Superior Court—which suggestion to Leon Superior Court could not be legal ground for issuing the writ from Leon Circuit Court, nor warrant the issuing of such writ of *scire facias*, nor make the same legal and valid.

3rd. That it doth not appear by said *scire facias* that Leon Circuit Court had any rightful power to issue said writ—for it is not shown, nor suggested, *either* that said Leon Circuit Court rendered said judgment, or that the record of said judgment now remains in the court which issued said writ of *scire facias*.

IV. That the court erred in ordering execution to issue, it not appearing to said Leon Circuit Court of record that no execution hath issued on said judgment.

V. That the said writ doth not show authority or power in Leon Circuit Court to issue execution.

VI. That in the judgment rendered on the 13th day of November, 1846, 'that the said plaintiff may have execution against the defendant for fourteen hundred and eighty-three dollars, the damages and the costs in the writ aforesaid specified,' &c., is erroneous. The said executions not being awarded "according to the full force and effect of the recovery" in said writ mentioned, but awarded for damages as of the date of 13th Nov., 1846.

VII. That the plaintiff was not entitled to cost, and there is error in said judgment in awarding; also, "that the plaintiff re-"cover against the said defendant his costs by him expended in "suing forth and prosecuting this writ."

Randall & Hagner, for Plaintiff in Error:

The defendant in error sued out of Leon Circuit Court a writ of *scire facias quare executionem non* against plaintiff in error. A

the return of the writ, the defendant below insisted that the plaintiff in this action should file a declaration according to the rules and practice of the court, or else at second term the suit should stand dismissed. 15 and 16 Rules adopted by the Supreme Court, January 1846.

Also sec. 20, Judiciary act, 94 of Duval's.

The court refused to require a declaration, but on the contrary required defendant to plead to the writ as a declaration.

We assign this as error.

Scire facias is considered at law an action in the nature of a new original. 2 Saunders Rep., 71, note 4. 6 Johnston's Rep., 106. 9 Connecticut Rep., 392.

It may be released by a release of all actions. Co. Litt. 290.

Scire facias to revive a judgment after a year and a day. 2 Saunder's Rep., 72d, and note 3.

In England the plaintiff files his declaration in *scire facias* of whatever character as in any other action. 2 Tidd's Prac., 1129. 2 Saunder's Rep., 72, n. 2 Chitty Arch. Pract., 835. See Tidd's Appendix of Forms—Declaration in *scire facias* to have execution. Issue and judgment thereon p. 515.

Our laws have made no alteration whatever in this respect.—*Scire facias* is an action here in Florida just as in England.

In New York they made a change by express statute. See 18

N. Y., 579, the plaintiff may require the

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We insist that this writ of *scire facias* is not sufficient whereon to ground the judgment.

A writ of *scire facias* to revive a judgment can only issue from the court having the record on which it was founded; and the writ itself embody every requisite to the exercise of the power asked for. 2 Tidd's Prac., 1105. 1 Ld. Raymond's Reps. 216. 2 Saunder's Rep. 72, n.

Also 23 Pickering, 110. 2 Pennington, 529. 7 Mass., 340.—9 Mass., 520.

Here the writ does not only *not* state the record to be within the court to which he applies, but even the suggestion on which the proceeding is founded is made in another court, to wit, Leon Superior Court.

Scire facias is granted partly upon a record and partly upon suggestion, without which no proceeding could be had upon the record. 2 Institutes, 470. 8 Bacon's Abrid., 598.

Now the suggestion made here was made in Leon Superior Court—so declared—and surely that suggestion there, cannot warrant a proceeding in another tribunal, to whom no such requisite information is declared to have been given.

It did not appear to the court that no declaration had issued, nor does the writ show any authority in the court to award execution of the judgment.

Again it is a principle as well established in practice as it is consonant to reason, that the judgment must be that execution be had of the original judgment to which nothing can be added. This is the prayer and it is answered *"fiat"—let it be done.*

The authorities are clear: 8 Bacon's Abrid., 627. 1 Pennington's Rep., 73. 2 Pennington's Rep., 529. Tidd's Appendix, 515—576, sec. 146.

Now the damages awarded here are in the nature of a new judgment, as of the date of 13th Nov., 1846.

Again, costs are awarded to the plaintiff. By reason of his own laches he had failed to sue out execution, and on the principle of *"vol unti non fit injuria,"* the common law allowed no costs in such a case. The Stat. 8 and 9, W. 3, Ch. 11, Sec. 3, gave costs t[o] plaintiff, obtaining judgment on an award of execution after ple[a] ioined thereon."

England on default until 3 and

William 4th, (1833-4) Ch. 42. See 2 Chitty's Arch. Prac., 835. 2 Tidd's Prac., 1132.

Scire facias is not amendable; but the proper way is for the plaintiff to move to quash it. 1 Hiller *vs.* Frost, 1 Str. Rep., 405. Impey's Prac., 528.

Long & Walker, for Defendant in Error.

LANCASTER, Justice, delivered the following opinion:

This case comes by writ of error from Leon Circuit Court. It is a *scire facias* to revive a judgment rendered by the Superior Court of Leon county in the year 1842.

The first error assigned alleges that the court erred in refusing to require the plaintiff Jos. F. C. Harley to file a declaration in this case, as appears by the bill of exceptions.

It appears by the record, that on calling the case on the appearance docket the defendant by his attorney moved the Court for a rule on the plaintiff to file a declaration in this case on or before the first day of the next succeeding term, and upon default of such declaration filed that the suit shall be dismissed according to the rules and practice of the court. Which rule was refused, *scire facias* being deemed a sufficient declaration in practice if plaintiff chose to rely upon it as such. The same to be pleaded or demurred to as a regular declaration. To which opinion and ruling of the court defendant excepted, which was signed, sealed and made part of the record.

The rule of the court referred to in the defendant's motion for a declaration is in the words following "all declarations must be filed on or before the first day of the term, and if not filed by the first day of the term thereafter, the suit shall be dismissed." This rule can only have reference to the cases where, by the statute, declarations are required to be filed. The act of Assembly which bears on the question is as follows: "In all actions brought to any of the Circuit Courts of this State, whether the same be commenced by *original process* against the person or against the estate of the defendant, it shall be the duty of the plaintiff or his attorney to file with the clerk his declaration on or before the first day of the term to which his action is made returnable," &c. Tho. Dig. 330, sec. 1. The case then in which a declaration is required by the statute is

in actions commenced by original process against the person or estate of the defendant. Original process against the person is declared to be a capias or summons *ad respondendum*. Act. Nov. 23, 1828. Tho. Dig. 321, sec. 1. Against the estate, is provided by attachment. Act Feb. 15th, 1834. Tho. Dig. 367, sec. 1. In all actions therefore brought by summons against the person, or attachment against the estate, the plaintiff is required to file a declaration by the statutes, and the rule of the court must be construed with reference to the statutes in the use of the terms "all declarations."

This is a case of *scire facias* to revive a judgment and is not an original but a judicial writ, founded on some matter of record, to enforce execution of it, and properly speaking is only the continuation of an action. A step leading to the execution of a judgment tion of an action. A step leading to the execution of a judgment already obtained and enforcing the original demand for which the action was brought. It creates nothing anew, but may be said to reanimate that which before had existence, but whose vital powers and faculties are as it were suspended, and without its salutary interference would be lost. 2 Sellon's Prac. 187—8. Yet it may properly be called to action because a release of all actions, or executions is a good plea in bar to *scire facias*. 2 Sellon Prac. 187. Nevertheless it is not an original process. The statute does not absolutely require a declaration in *scire facias* to revive a judgment. It is therefore mere matter of practice whether it should be required or not. In England as well as in many of the States of the Union, the custom of declaring on *scire facias* is believed to exist. In Virginia, Kentucky, Tennessee and some other States, the practice appears to be to plead to the writ. No evil attends this practice, every defence which could be made by way of plea, or demurrer to a declaration may also be made to the writ, and unless it contains all the allegations and averments necessary to a valid declaration will be held bad on demurrer. The practice is convenient, because it waives the necessity of a formal declaration and prevents repetition on the record. The form of a declaration in *scire facias* on judgment is nothing more than a repetition of the writ, with a prayer for execution. The writ cites the defendant to shew cause why execution shall not issue. It may be considered substantially in the nature of a prayer for execution. 2 Sellon's p. 51. No practice has yet been established by the Supreme Court, and it is understood it has differed in the various Circuits. It is thought under the considerations hereinbefore expressed that in *scire facias* upon judg-

ment a declaration is not necessary, and not required by law, and that the court did not err in refusing to grant a rule on plaintiff for a declaration as moved by defendants attorney.

The second error assigned is: The court erred in requiring the defendant to plead to the writ of *scire facias* as a declaration.

For the reasons before set forth this assignment of error is considered by the court not well taken, and is overruled.

The 3d error assigned alleges the writ of *scire facias* to be altogether irregular and insufficient, because, firstly, it does not allege the judgment set forth was regularly rendered. Secondly, that the writ of *scire facias* doth not allege that suggestion hath been made to Leon Circuit Court that execution remains to be made, but alleges the suggestion of that fact hath been made to Leon Superior Court, which cannot be legal ground to warrant the issuing the writ from Leon Circuit Court, nor make the same legal and valid. And thirdly, it doth not appear by the writ of *scire facias* that Leon Circuit Court had any rightful power to issue said writ, for it is not shewn or suggested that Leon Circuit Court either rendered the judgment, or that the record of said judgment now remains in said Circuit Court from which the writ issued.

As to the first ground set forth in third assignment of error it is stated in the writ "at a Superior Court of the Middle district of Florida, for the county of Leon, begun and held at the Court House in the city of Tallahassee on Monday the 14th day of November, 1842, and continued till and after Monday the 21st November, 1842, a certain Joseph F. C. Harley on the said 21st November, 1842, by the consideration of said court recovered against one David Brown a judgment for," &c.

The existence of the Superior Courts under the Territorial Government of Florida, their powers as courts of general jurisdiction, and the transfer of all causes civil and criminal pending in the Superior Courts to the Circuit Courts, for the counties in which such cases may be so pending, together with all papers connected therewith or relating thereto, are parts of the legal and judicial history of the country of which the courts will take notice, as well also as the authority vested in the Circuit Courts, to proceed in all such causes. The Superior Court which rendered the judgment was a court of record of general jurisdiction. It is alleged in the writ as before set forth that the plaintiff by the consideration of said court, recovered against the defendant a judgment, &c. It is a presump-

tion of law, that everything done in a court of record of general jurisdiction, is rightly and *regularly* done, unless the contrary appear upon appeal or writ of error, the allegation that judgment was regularly rendered is unnecessary.

The second ground of objection set forth in the third assignment of errors appears to have more weight. After reciting the judgment given in the Superior Court the writ of *scire facias* goes on further to state "and now on behalf of the said Joseph F. C. Harley it hath been understood in the said court that although the judgment thereof is given, yet execution for, &c., remains to be made, &c."

To what court is suggestion made, that execution remains to be made of the judgment? Most clearly to Leon Superior Court—a court having no existence at the time the suggestion was made, which could then issue no writ whatever, and a suggestion, too, which could furnish no warrant or authority for any proceeding in the Circuit Court. If a declaration had been filed in this case, and had alleged a suggestion to the Superior Court, that execution remained to be made, it would be bad on demurrer, because such a suggestion would not authorize the Circuit Court to order execution. It might be amended by the writ if there was any thing to amend by, but in this case the writ is as bad as the declaration would be. The judgment (rendered in this case) was by default. It was incumbent on the plaintiff to proceed on a valid writ. A majority of the court think the writ is defective.

The judgment is not a judgment for execution, but for a specific sum in damages as prayed in the writ, and for costs also in this proceeding. This is clearly error.

The judgment should have been, "Let execution issue, according to the force, form, and effect of the judgment aforesaid, by default of the said D. B., defendant." 2 Sellon's Practice, 50.

The judgment of the court below is therefore reversed, and the writ dismissed without prejudice to any future action of the plaintiff on his original judgment.

David Brown, vs. Joseph F. C. Harley.

BALTZELL, Justice, dissenting:

The objection which has occasioned the reversal of the judgment and dismissal of the writ in this case is to the words 'the said court' which are construed to mean the Superior Court. The precedent in Chitty will be found to be as follows: And now on behalf of the said A. B. in our said court before us, we have been informed, &c.' The variance would seem to be in the use of the word *the* for *our*, whilst the substitution of the latter in the writ would have obviated the difficulty.

We are at a loss, however, for the rule that confines the construction of an instrument to one word or a part of a sentence. The cardinal rule for construing all instruments is that the whole is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. In case of difficulty in the construction, there certainly is greater reason for rejecting a word as repugnant and insensible, than for a disregard of the remainder of the sentence, or of the writing. In the case under consideration there would be no unusual stretch in construing the words *"the said"* to refer to the Circuit Courts even if Superior had been the antecedent. Courts are not tied down to the grammar of sentences or writings as to their construction, but will control even the literal terms, if they contravene the main purpose and object. One of the rules is that a construction is to be avoided which will defeat the instrument —*ut res magis valent quam pereat*. So also a construction which is against reason, is to be avoided. Now the Superior Court is admitted not to have been in existence, so that there could have been no thought of application to it any more than if the name of a dead man had been used.

But looking to the entire sentence we submit, with deference, that every difficulty is avoided. After the quotation of the court "yet execution for the damages still remains to be made," &c., it continues, "wherefore the said Harley hath *besought* that a *proper remedy* be granted in this behalf."

Of whom was this asked—to whom was the application made? Most clearly the Circuit Court as the very writ itself shews in commanding the party to appear in the Circuit Court and shew cause, &c.

Admitting that there was a mistake as alleged, the inquiry arises [illegible] the Court say it was, and that a demurrer would lie

for such defect. We do not so understand the law. It is a *suggestion*, not an allegation that is complained of, a suggestion to the wrong court. Now we propose to show that this suggestion was not necessary, and that the allegation 'that execution still remains' was sufficient without it to sustain the writ.

"A writ of *scire facias* to revive a judgment, may issue of course at any time within seven years from the date of the judgment without application to the court." Tidd's Prac., 1156.

A *scire facias* on a judgment after a year and a day states the judgment recovered by plaintiff, and the court in which it was obtained. It then states that although judgment be thereupon given yet execution of the debt, &c., still remains to be made. 2 Tidd. 1157.

The test is whether plaintiff would be required to prove the suggestion, or defendant could put it in issue or controvert it. Most clearly not. It was then matter not of substance but of form, and might be rejected as surplusage. 1 Chitty, 232.

Whilst we think the decision clearly against general principles we hold it to be against statutory provisions also. Referring to the record we find the *proecipe* to this effect.

"JOSEPH F. C. HARLEY,
vs. } In Leon Circuit Court.
DAVID BROWN,

The Clerk will isue a *scire facias* to revive the judgment which was rendered in the above case on the 21st of Nov., 1842, dated April 4, 1846."

It was not then the fault of the plaintiff that the word *the* was put in place of *our* in the writ, or that a mistake was made. Now the Supreme Court has held in the case of the Union Bank of Florida, *vs.* Edwards, the English statutes of Jeofails in force. 1 Florida Rep., 153.

One of these provides that "no process shall be annulled or discontinued for the misprison of the Clerks in writing one syllable, or letter, or word too much or too little, but as soon as the mistake is perceived it shall be amended in due form. And the justice before whom the record is made, or shall be depending by way of error, or otherwise, may amend the same as well after as before judgment in the same manner as they might have done by the above statute, before judgment."

"So the court may amend whatever to them seemeth to be the mis-

prison of the Clerks in any record, process, word, plea, warrant or attorney, writ, panel, or return, which may for the time be before them so that no judgment shall be reversed by reason of such misprison.' 8 H. 6, C. 12. 9 H. 5, C. 4. 2 Arch. Prac., 1115.

"The courts have power of amending a *scire facias* for any misprison of the Clerks by Stat. 8 H. 6, C. 12, already mentioned that statute expressly including writs." 2 Arch. Prac., 1133.

"Although the omissions, variances and defects, by 16 and 17 Car. are required to be amended, the benefit of the act is attained by the court overlooking the exception." 2 Tidd, 960. 2 Strange, 1011.

But again the ordinary process for the commencement of a suit is by way of summons to answer in an action on the case of trespass, &c. Now although this gives him not the slightest information of the nature of the charge against him, it has yet been held sufficient by the courts for centuries. Can it be that greater precision, more definite allegation is required at the end, after a party has obtained his judgment for leave to issue his execution? There is no reason indeed why on mere motion and notice to the defendant a plaintiff should not have this permission without putting him to the expense of a new suit and a requisition of strictly formal allegations and suggestions.

The course of the courts of the present day everywhere (and such has been hitherto that of this court,) has been to relax and to discountenance objections of mere form. In this case the defendant appeared by attorney, and took a rule on the plaintiff to file a declaration, this shews that he was not misled by the suggestion of the wrong court, this of itself was sufficient to cover any defect of the writ. Nor is there a pretext that he has any defence or valid objection to the application.

For these reasons I hold that the judgment of the Circuit Court should have been affirmed, and have to express my regret that a suitor after two years of fruitless toil and effort to get leave from the court to have execution in a case of admitted right on a judgment, without any fault of his, with all the expense of this court, and the court below, has his suit dismissed, and is to be subjected to the expense, trouble and delay, of another suit before he obtains his rights.

John G. Camp, vs. W. D. Moseley and others.

JOHN G. CAMP *vs.* W. D. MOSELEY, AND MARTHA ANN MANLY, AND HIRAM MANLY, IN RIGHT OF HIS WIFE, ADMINISTRATORS AND ADMINISTRATRIX, *de bonis non*, OF SAMUEL PARKHILL, DECEASED.

The officer will be protected in the execution of process emanating from a court of general jurisdiction, provided that it appears on the face of the process that the court has jurisdiction of the *subject matter*. The officer in such case need not show that there is a judgment, but may justify under the *writ* alone.

Where the *subject matter* of the suit is within the jurisdiction of the court, but the want of jurisdiction is as the person or place, unless the want jurisdiction appear on the process to the officer who executes it, he is not a trespasser—contrary, when the *subject matter* is not within the jurisdiction of the court.

The technicalities incident to estoppels are graudually giving way to considerations of reason and practical utility, and the courts at the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality.

Where one was present when a levy is made by the officer, and did not deny the right of the officer to make such levy, but furnished a list of property to be levied on, attended the sale and took an active part assisting the officer, advised bystanders to bid, and disapproved the forbidding of the sale by another: Held —that, although it appeared that such conduct was not fraudulently or willfully intended to deceive the officer, the party so conducting himself is *estopped* from afterwards alleging that the officer was a trespasser.

The acts and admissions of one of several administrators, which amount to an *estoppel* against him, bind the whole.

The effect of an *estopped*, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court, and not of fact for the jury.

Writ of Error to Leon Circuit Court.

William D. Moseley and Martha Ann Manly, administrator and administratrix *de bonis non* of Samuel Parkhill, and Hiram Manly, in right of his wife, (said Martha,) administrator *de bonis non*, at the Spring Term (1846) of Leon Circuit Court, instituted an action of trespass against John G. Camp, for seizing a large number (180) of slaves.

The declaration alleged the slaves to be the property of the plain-

tiffs in their representative character—that they were seized and taken by defendant and by him detained for a long time, and that thereby the plaintiffs were hindered and prevented from cultivating and keeping in preservation three several plantations, and were deprived of the use and benefit of the slaves, and were prevented from enjoying the profits, benefits, and advantages of their labor and services, and were put to great expense in regaining the possession of the slaves. The plaintiffs laid their damages at $50,000.

The defendant pleaded "not guilty," with privilege (by consent) to give in evidence under that plea the process on which he relied for justification.

At the trial of Jabez B. Bull, Richard A. Shine, and David C. Wilson, three of the jurors so summoned as aforesaid good and lawful men were objected to by the plaintiffs' attorneys, for cause then and there shown, to wit: that the said Bull and the said Wilson were stockholders and directors in the Union Bank of Florida; and the said Shine was objected to for cause, viz: that the said Shine was a purchaser at the sale of the property of Parkhill's estate, seized and sold under an execution issued in the suit of the Union Bank of Florida *vs.* Parkhill's administrators, which execution was in the hands of and sale made by John G. Camp, Marshal of Middle Florida, and under which defendant justified the alleged trespass. These objections to the said jurors on behalf of the plaintiffs by their attorneys were sustained by the court, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs offered Benjamin W. Gause a witness, who proved that he was appraiser of the property of the estate of Samuel Parkhill, deceased, and appraised these negroes at the instance of plaintiffs in the fall of 1844, or spring of 1845, and the negroes afterwards went into the possession of plaintiffs. Before the sale by the Marshal a part of the negroes were hired by plaintiffs to witness, and were delivered up to the Marshal, who informed him that he took them by a precept of the court—estimates the value of the hires at $20 each—knows of sale by Marshal—and here the plaintiffs rested their case.

The defendant then offered in evidence a certain execution issued from the late Superior Court of Leon county, Territory of Florida, at the suit of the Union Bank *vs.* Hiram Manly and Martha Ann

Manly, administrators of Samuel Parkhill, deceased, which said writ of *fi. fa.* is in the words of and figures following, to wit:

THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you that of the goods and chattels, slaves, lands, and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife, said Martha Ann, administrators of Samuel Parkhill, deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the first day of March, 1845, recovered in our Superior Court for the County of Leon, in the Middle District, as well for its debt as its damages occasioned by the detention of said debt, and likewise the sum of seven dollars eighty-two cents, which to the said Union Bank of Florida in the same court was adjudged for its costs by it in that behalf expanded, together with lawful interest on said damages from the rendition of said judgment till paid, and the costs of this writ, and of your proceedings hereon, and that you have the said sums of money before the Judge of our said Court at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid; and have then and there this writ.

Seal of Court. Witness, Richard T. Birchett, Clerk of our said Court, at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the Independence of the United States the sixty-ninth year.

R. T. BIRCHETT, *Clerk.*

[*Endorsed:*]—Came to hand 20th March, 1845, and levied on the following slaves: Tom Gandy, Harriet, Mary Ann and Wm. Washington, Sam Cormick, Primus, Sarah, George Edmondson, George Lewis, Daniel, William Eppes, Matilda Ann, Sarah and Maria, Julia, Anthony, Molly, Patsey, Hannah, Israel, Sarah and Harriet Ann, Kealan, Jacob, York, Melinda, Squire, Queen and Eliza Ann, Rhoda, Jack, Billy, Moses, Martha, Lucinda and William, Fenton and Helina, Frank, Francis, Isaac, Richard, Juba, Toney, Becky, Jinny, Cuffy, Phillis, Chloe, Dolly, Sam, Elizabeth,

Rachael, Adeline, Jane, Polly, John Robinson, Monachy, Elizabeth Eddy, Bob, George, Maria Miles, Mary, Frederick, William Pryer Louisa, William, Christina, Horace, Judy Linsey, Susan, Charley Johnny, Mary Long, Joe, Ephraim, Ellen, Cornelia, Rachael, Jacl Morgan, Mary, Toney, Sibby, William, Toney, Scipio, Peggy Isaac, Lucy, York, Grace, Rose, Abram, James, Jones, George York, Jr., Caroline, Morgianna, Fanny, Mary Page, Margaret Phœbe, James, Juba, James, Frank, Margaret, Albert, Anderson Pleasant, Edmund, David, William, Cæsar, Amy, Dick, Phillis Richard, Israel, Ellick, Esther, Amy, Albert, Old Jack, Margaret Homady, Pittman, Cary, James, Old Tom, Frederick Clark, Nancy Burney, John, Anna, Susan, Maria, Giles, Fanny, Martha, Ned Francis, Barbary, Kitty Ann, Wilson, Nancy, Ben, Hercules, Hanly, Eliza, Jacob, Winney, Emily, Tom Hackley, Diana, Ellen Amelia, Betsy Ann, Dick, Lisbon, Katy, Cyrus, Henry, Taylor Mary Thomas, Louisa, Clarissa, Elizabeth, Anthony, Ben, Sam Nancy Pool, Walker, Maria, Amy, Maria, Penny Davidson, George Phil, Betty, Nelson, Selva, Matilda, Sarah Ann, Amelia, Wakala, Virginia, Charity.

JOHN G. CAMP, *Marshal.*

To the introduction of which evidence the plaintiffs objected, on the ground that they were strangers to it, and required the original entry and record of judgment to accompany it; which objection, on argument had, was sustained by the court, and the defendant required to produce in evidence the said judgment; to which ruling of the court the defendant, by his counsel, excepted. The defendant then offered in evidence other executions, which were in the hands of the Marshal at the time of the trespass complained of, and upon which like proceedings were had as on the one of the Union Bank *vs.* Parkhill's administrators, already given in evidence. The pleadings and proceedings in these cases were admitted by the parties to be similar to those in the case in which the above execution issued.

The defendant then proved by Wm. G. Ponder, a competent witness, that he was present at the sale of the Parkhill slaves, under the executions of the Union Bank and others, in the Spring of 1845. Moseley was present at the sale, and advised witness to purchase. Something being said as to title, Moseley said there would be no difficulty, he thought the title good; said that he had hired a certain negro, and that he thought he would suit witness. Witness sta-

ted that the general opinion was, that all difficulty arising out of litigation about the Parkhill estate was at an end; that the judgment was legal, and there was no good objection to the sale of the property.

The defendant also proved by William Bloxham, a competent witness, that he was present at the sale of the slaves. Had a conversation with Moseley the last night after the sale. Went with James T. Archer, Esq., to the room of Moseley. Archer said he was going to write to New Orleans to have the negroes sent there stopped. Witness told Moseley what Archer said about stopping the negroes, and Moseley said he would have nothing to do with it; that he would not let them use his name. Moseley was at the sale; was acting there; objected to only one negro woman being sold; and she was replevied. Moseley bid at the sale for that negro, and run her up. When Colonel Gamble bid for any negroes, Manly asked witness to bid against him. Witness on cross examination, stated that Moseley observed, that the negro woman was replevied; that a friend of his had wanted her, and he would make somebody pay for her, and he run her up to $800. All the negroes were not sold on the first day. This negro was sold after several others.— Witness got to the ground as Mr. Thompson got off the cotton bale. Moseley was there with a paper taking down the prices and names. As Col. Gamble had bid very often, people declined to bid. Moseley said to witness that was too little, and added, "Mr. Bloxham bid upon the negroes." Witness did so and made them bring $1500 more.

The defendant also proved by Otis Fairbanks, a competent witness, that he was present at the sale of the Parkhill slaves, in May, 1845. The negroes were selling low. Witness was on one side of of a cotton bale and Moseley on the other. Moseley said, "bid, I don't want the negroes sacrificed," and said he would be glad when they were off his hands. Cross examined, stated that Moseley did not call his name, his eyes passed around, and what he said was general to the whole crowd. There were many persons present.— The remark of Moseley was in a common conversational tone. Witness bid for one or two of the negroes, but none were knocked down to him. Heard Mr. Archer forbid the sale as illegal; cannot state all the words he used; heard but one sentence; don't recollect on whose behalf he acted, but knew he was counsel for the estate.— Moseley was there. After he said, "bid, I don't want them sacrificed," the negroes sold better. Did not see Gov. Moseley there

when Archer made the announcement. Being re-examined, stat that, on reflection, he was satisfied that Moseley was present whe Archer forbade the sale. He, (Moseley,) disapprobated Archer act, and said he had better let them go; they never could go at better time.

The defendant then proved by John G. Gamble, a competent wi ness, that he was present at a part of the sale; was not there whe the first negroes were sold; saw Gov. Moseley there, had conve sation with him on that day, and on the second day of sale. Go Moseley divided and arranged the negroes in lots; advised people bid; said it was a good sale; he was glad of it; said his reason fc separating the families, (which was contrary to the wish of witnes was, that he was determined to make them bring as much as poss ble; said the sale was good, and he wanted to get rid of the bus ness. Witness heard no dissent, none whatever, to the acts of tl Marshal; no objection on the ground of illegality of sale; was n there when Mr. Archer dissented. Gov. Moseley did aid the Ma shal in the sale. He divided the negroes; called them up in su cession as they were sold. Moseley had a list; witness also h one; we were constantly conferring; Moseley designated the lo in which they should be sold; was present at the sale of negro E len; is uncertain whether it was on the first or second day. Mos ley objected to the sale of Ellen, stating he had intended she shou be replevied; that was the ground of his objection. All the negro were mortgaged; two hundred for the stock debt; forty odd we mortgaged to secure accommodation paper; saw Manly at the sal had no intercourse with him. Witness bid at the sale for negroes did so as agent for Mr. Minetzhazen, by whom he was authoriz to buy one hundred negroes for him; bought for him ninety.

The defendant proved by John George Anderson, a compete witness, that he was present at the sale; but he proposed to tl Marshal, Major Camp, to give a certain sum for a family of negro Camp referred witness to Gov. Moseley, who on application repli that the negroes must be sold separately. The Marshal refused take the responsibility of putting them up together, without the co sent of Moseley, who declined acceding to request of witness.

The defendant proved by Thomas H. Hagner, a competent wi ness, that R. T. Birchet was Clerk of Leon Superior Court, a John G. Camp, Marshal of Middle Florida, at the time the ex cution of the Union Bank, *vs.* Parkhill's administrators, issue

That the list given in evidence, and referred to in the endorsement on the execution was the same identical one by which the negros were sold by the Marshal, and the said list is admitted to be the one furnished the Marshal by Gov. Moseley.

The defendant then proved by Dr. John G. Gamble, a competent witness, that he was present at the sale of the Parkhill negroes, was there at the commencement, heard Mr. Archer forbid the sale *on the ground* that Mrs. Manly had not relinquished her dower in the slaves. L. A. Thompson, Esq., got up and said that had been adjudicated in the highest Court of the Territory, and that the sale was legal. M. A. Long and L. A. Thompson, competent witnesses, both depose that Mr. Archer forbade the sale only on behalf of the widow, as she claimed a right of dower in the slaves. The defendant then proved by R. T. Birchett that he was present at the sale, saw Moseley, Camp and Col. Gamble standing together conferring as to the sale, and as to putting the negroes up in parcels. Witness said he was Clerk of the Superior Court of Leon county, and that Mr. Archer filed a bill for dower on the morning of the sale, in behalf of Mrs. Manly and said he did not expect the court to grant it.—The defendant here closed his case.

The plaintiff then offered in evidence the record of the revocation of the letters of Martha Ann Manly as administratrix of Samuel Parkhill, deceased, in Leon County Court, dated the 18th March, 1844, in words and figures following, to wit:

At a Superior Court for the County of Leon, continued and held at the Court House in the City of Tallahassee, on Monday the 18th day of March, A. D. 1844, present the Honorable Samuel J. Douglas, Judge. In the matter of the estate of Samuel Parkhill, deceased:

On an appeal from an order of the County Court of Leon County revoking the administration of Martha Ann Manly, late Martha Ann Parkhill:

This cause coming on to be heard anew upon the merits, and it appearing to the satisfaction of the court that Henry Bond, Richard K. Call, George K. Walker and Benjamin W. Gause, the securities upon the official bond of the said Martha, are insufficient: It is therefore ordered that the judgment and decree of the County Court be affirmed, and that the letters of administration hretofore granted to the said Martha be and remain revoked, annulled and set aside. It is further ordered that John G. Camp, Esq., Marshal of the District of Middle Florida, do take the property of the said estate of

Samuel Parkhill in his possession to remain there until the further order and direction of the court.

To which the defendant by his counsel objected on the ground that defendant was no party to the proceeding then and there had, and that it was not proper testimony to be taken into consideration by the jury in maintainance of the issues joined on the part of plaintiff, but the court overruled the objection, and permitted the said record and evidence to be read to the jury, to which decision and ruling of the court, the defendant by his counsel excepted.

And said plaintiffs also offered in evidence the record of the 21st of March, 1844, appointing said John G. Gamble, Receiver, which record is in the words and figures following, to wit:

At a Superior Court for Leon County, continued and held at the Court House in the City of Tallahassee, on Thursday, the 21st day of March, A. D., 1844, present the Honorable Samuel J. Douglas, Judge: *In re,* Estate of Samuel Parkhill, deceased:

Ordered that John G. Gamble, Esq., of the County of Leon, be, and he is hereby appointed receiver of the Estate of Samuel Parkhill, late of Leon county, deceased, not administered by the late administratrix, until the County Court of Leon County shall appoint an administrator *de bonis non,* upon said John G. Gamble's entering into bond with two or more sufficient securities, in the sum of one hundred thousand dollars, conditioned for the faithful performance of his duties as such Receiver, and to obey the orders of this court in that behalf, said bond to be approved by this court, and it is further ordered, that upon the approval of said bond by the Judge of this court, the Marshal of this District be and he is hereby ordered and directed to deliver the possession of all the estate real and personal now in his custody, unto the said John G. Gamble, as Receiver as aforesaid and take his receipts therefor returning the same with his accounts and charges to this court to be audited as this court shall direct.

To the reading of both of which records that of the 18th of March, 1844, and that of the 21st March, 1844, the defendant by his counsel severally objected on the ground that it was not proper testimony to be read or to be taken into consideration by the jury in maintenance of the issue joined on the part of the plaintiff, but the court overruled the said several objections and permitted the said records of the 18th of March, 1844, and the 21st of March, 1844, to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs further offered in evidence the written pleadings in the cause in which the Union Bank of Florida was plaintiff and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, were defendants, to which the defendant by his counsel objected as improper evidence to be read to the jury, or to be taken into consideration by them in maintainance of the issues joined by the plaintiffs, but the court overruled the objection and permitted the said pleadings to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence the record of the reversal of the judgment in the suit of the Union Bank of Florida plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, defendants on which judgment the execution offered in evidence by the defendant, was issued, to which the defendant by his counsel objected: 1st, because he was not a party thereto; 2d, because the reversal of the said judgment by the Supreme Court was subsequent to the trespass complained of; and lastly, because it was not proper testimony to be read to, or taken into consideration by the jury in maintainance of the issues joined on the part of the plaintiff; but the court overruled the objection and permitted the said record to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence a bill in Chancery, filed 10th April, 1845, [and praying an injunction against the sale, with the endorsement of a refusal by the court to grant the prayer,] in which William D. Moseley and his securities on his official bond, as administrator *de bonis non*, of said Parkhill, deceased, were complainants, and John G. Camp, the defendant, in this action, and others, were defendants, to which the defendant by his counsel objected, unless it was also shewn that subpœna had issued and was served on this defendant, and also because it was not proper testimony to be read to, or considered by the jury in maintenance of the issues joined by the plaintiffs in this action; but the court overruled the objection and permitted the said bill to be read to the jury, at which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence the stock mortgages given by Samuel Parkhill in his life time to the Union Bank of Florida to show that the slaves levied on were mortgaged to said Bank, that the mortgages were not yet due, that the administrators of

Parkhill as representatives of the Estate, were trustees for the bondholders and general creditors, and entitled to the possession of the negro slaves levied on and sold, until the mortgages should fall due, and that the said mortgages were on record and notice to all the world, and that under the charter of the Unon Bank the property thus mortgaged could not be sold. To this evidence the defendant by his counsel objected, as not proper to be read or to be taken into consideration by the jury, in maintenance of the issues joined on the part of the plaintiffs, but the court overruled the objection, and permitted the same to go to the jury; to which decision and ruling of the court the defendant by his counsel excepted.

The defendant to rebut this evidence on the part of the plaintiffs, offered John G. Gamble a competent witness, who proved that the mortgages were given for stock subscribed for, by Samuel Parkhill in his life time; that the note sued on, and in judgment, was for money borrowed on the pledge of that stock; that the note given by said Parkhill for the money so borrowed, called a stock note, was overdue and the interest thereon for a long time unpaid, and was unpaid up to the time of suit instituted and judgment recovered; at the time of the sale the Unon Bank of Florida had deposited with the Clerk of Leon Superior Court by order of the Judge thereof, Territorial bonds in amount equal to the amount and sum for which the slaves were originally mortgaged, subject to the order of the Governor of Florida.

The plaintiffs then offered James T. Archer as a witness, who said he would hardly venture to speak with certainty, of what took place at the sale in May 1845, after what had been testified on the other side. But from the following *facts* he believes he did forbid the sale as illegal.

When the judgment under which the sale was made was rendered against the original administrators, there was a large number of suits pending at the same time. Witness as attorney for the estate deemed the judgment invalid and void and having it in view to contest proceedings under it, he suggested that all the suits should be placed in judgment by agreement on like pleadings and subject to all exceptions. This was acquiesced in as the record will show. After the levy witness in furtherance of his views presented the bill (referred to as filed 10th April, 1845,) in behalf of Moseley and his sureties, praying an injunction against the plaintiffs in execution and the Marshall. The application was refused. Afterwards on the

morning of the sale the witness presented a bill in open court in behalf of Mrs. Manly stating her dower interest in the slaves and praying an injunction against the sale of that interest. Witness stated at the time of this last application, that this bill raised the same question as the one previously presented, that he did not expect the order to be granted, but that he made the application, that purchasers might know that their titles would be disputed.

Immediately after this witness wrote in the marshals office a written protest against the sale and handed it to Manly to read before the bystanders. Manly said witness had better make it himself.—Witness did undertake this duty. He was somewhat excited.—Knows he did object to the sale on the point of dower, and believes from his previous course, views and intentions that he stated and gave notice that the sale was illegal and that purchasers would bid at their peril.

Witness recollects that Mr. Thompson referred to the decision of the Court of Appeals and guaranteed the sale to be valid; according to the best of his recollection Governor Moseley was not present when he forbid the sale; does not recollect whether he did order subpœna on the bill shewn in evidence. In reference to conversation between Moseley and Bloxham and witness, he told Bloxham that he understood he had purchased some of the negroes, and that he (witness) would pursue them; is satisfied that the Governor never did in his presence say "his name should not be used in the proceeding against these negroes;" knows but few of the negroes; knows that plaintiffs have not got them.

This was all the testimony offered.

After argument of counsel on both sides, the court delivered to the jury the following charge and instructions, viz: The letters of administration to Manly and wife having been revoked, the court had no power to give any judgment binding on the estate. The judgment set up in this case was a nullity. That though it is the general rule, that the officer executing process issued from a court of general jurisdiction is not bound to enquire into the regularity of the proceedings, and may justify under the execution, ye the exception arises in this case from the fact of the personal knowledge of the Marshal proved, that he knew and had notice th Manly and wife were not the administrators, and this prevents hi from justifying under the execution. Yet conceding that he mig justify under the execution, if he had taken the property of t

defendants to the execution, does that justify him in levying upo property of the estate of Samuel Parkhill, in the hands of the ac ministrators *de bonis non,* the plaintiffs in this action? The cou thinks it does not. He was not commanded to disturb property i their hands. It is contended that the Marshal should have been ir formed by plaintiffs if their property became mingled with that c the defendants in execution. The court thinks this case cann arise. If the Sheriff takes the goods of the wrong party, even thoug he have the same name, he is liable; it is the duty of the officer t ascertain the truth.

In reference to the admissions of Moseley and Manly, the cou admitted the evidence in all its extent, for benet of defendant. Tl question, however, arises, as to the effect, weight and sufficiency c this evidence. The act complained of is a trespass; if Moseley c these parties did any thing to induce the Marshal to commit th trespass, to lead him to make this levy, (for that is the trespass,) th plaintiffs could not complain. Did the Marshal go there to mak the levy under this process, or did he do it at the instance of Mos ley? But again, if a trespass was committed by the levy, the que tion is, have they waived it on the day of sale or previously? Wa the delivery of the list a waiver? The position of the parties is t be considered. They might have given embarrassment to the ofl cer, or not being able to resist, they might give him facility to con plete the act. It is for the jury to inquire, if this would be a wa ver of the trespass. Now as to the proceedings on the day of sal Whether this sale was then assented to, would appears to be a que tion more specially for the purchasers. Were the plaintiffs boun to embarrass that proceeding? If you think they waived the tres pass, it is for you to determine; if so, you would find for the defer dant. If, however, the remarks made were mere statements, nc to mislead Camp, not to induce him to act, then it is no waiver.— This is a question for you. The court then read to the jury th law as laid down by Judge Baldwin, Sedwick on Dam. p. 550, ta ken from 1 Bald. 138, as to the rule of damages in trespass, and ad ded as the effect of the law, that the jury should put the plaintiff where they stood as near as possible, not taking into consideratio the value of the property, for which plaintiffs do not contend, bu only the injury.

The Judge here closed his charge, and the defendant, by his coun sel, asked the following instructions to the jury:

John G. Camp, vs. W. D. Moseley and others.

1. That where the Court has jurisdiction of the subject matter it is sufficient to justify the officer executing its process, and the officer is not bound to examine into the validity of its proceedings, or the regularity of its process.

2. That if the subject matter of the suit is within the jurisdiction of a Court of general jurisdiction, but there is a want of jurisdiction as to the person, the officer who executes process in such suit is not a trespasser, unless the want of jurisdiction appears by such process.

3. That where the Court has jurisdiction of the cause, and the process is regular on its face, the officer who levies the same is justified in such levy.

Mem.—The instructions numbered 1, 2, 3, were given by the Court as the general rule, with the qualification, that in this case the defendant, having been a party to these proceedings, must be held cognizant of the irregularity of the process.

4. That the plaintiff in the suit on which this execution issued being the mortgagee of the slaves levied on, the Marshal who proceeded at the request of the said mortgagee in whom the legal title was, is no trespasser for the levy and seizure under said execution.

5. If the jury shall believe from the evidence that William D. Moseley, one of the plaintiffs in this action, aided the Marshal, by giving him information, furnishing a list to enable said Marshal to make the levy, by assisting said Marshal on the day of sale, by encouraging persons to bid for and purchase the slaves levied on, then the said Moseley is estopped by said acts from setting up this trespass, and cannot maintain this action.

6. If the jury shall believe, from the evidence, that William D. Moseley neglected to forbid the sale of the slaves levied on, that he failed to warn the Marshal that he had levied on property to which he, Moseley, had a claim and right of possession, then such silence must be looked on as an acquiescence by said Moseley, in the acts of the officer, and he is thereby estopped and precluded from maintaining this action.

7. That a valid judgment binding the estate of a decedent may be rendered against an executor sued as administrator, or *vice versa*, unless the difference of official character be pleaded in abatement, and that when rendered against an administrator as such who is in fact executor, or against a defendant executor who is in fact administrator, yet that the judgment in either case is valid against the estate, it is binding on the estate, and may be satisfied out of it.

8. That if under any state of things a proceeding under execution on the judgment rendered was allowable, the Court, would assume that such a state of things did exist for the officers protection, or at least he should not be required to judge whether it did or not.

Which said instructions, numbers 4, 5, 6, 7, 8, the Court refused to give to the jury, which refusal of the Court, and to the qualification of the 1, 2 and 3 instructions prayed, and to the several points herein before excepted to, and to the charge of the Court, and the points therein ruled, the defendant by his counsel excepts, and prays this his bill of exceptions may be sealed and signed by the Judge, and made a part of the record.

THOMAS BALTZELL, [SEAL.]
Judge.

The Plaintiff in Error now seeks to reverse the judgment below upon the following assignment of errors.

1. The Court below erred in sustaining the objections to Jabez B. Bull, Richard A. Shine, and David C. Wilson, as proper, lawful, and qualified jurors to sit in this case in the Court below.

2. The Court erred in refusing to permit the execution of the Union Bank vs. Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, to be read to the Jury, unless accompanied with the original entry and record of judgment.

3. In permitting the plaintiffs in the Court below to read in evidence to the jury the records of the 18th March, 1844, and the 21st March, 1844.

4. In permitting the plaintiffs to read as evidence to the jury the written pleadings in the cause in which the Union Bank of Florida was plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, were defendants, and in overruling the defendants objection to the introduction of said written pleadings as proper evidence.

5. In permitting the plaintiffs to read as evidence to the Jury the record of the reversal by the Supreme Court of Florida, of the judgment in the suit of the Union Bank of Florida, plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, defendants, and in overruling the objections to the introduction of said evidence.

6. In permitting the plaintiffs in the Court below to read in evidence to the Jury the Bill in Chancery filed 10th May, 1845, and in over-

ruling the defendant's objection to the introduction of said Bill in Chancery as evidence in the case.

7. In permitting the plaintiffs to read in evidence to the jury the mortgages executed by Samuel Parkhill in his lifetime, to the Union Bank of Florida, and in overruling the defendant's objection to the introduction of said mortgages as evidence in this case.

8. The court erred in its charge to the Jury in arguing and deciding the facts, which it is alone the province and duty of the jury to determine.

9. In refusing the 1, 2, and 3 instructions as prayed by the defendant's counsel, and in adding to the said instruction the qualification as set forth in the memorandum.

10. In refusing the 4th Instruction asked for by defendan's counsel.

11. In refusing the 5th Instruction prayed for by defendant's counsel.

12. In refusing the 6th Instruction prayed for by defendant's counsel.

13. In refusing the 7th Instruction asked for by defendant's counsel.

14. In refusing the 8th Instruction asked for by defendant's counsel.

Douglas & Hogue, for Plaintiff in Error.

I. Under the first error assigned the plaintiff's counsel will contend:—

1. That he was entitled to a jury selected, summoned, and returned, according to law; and only such objections could be made and sustained to individual jurors as are recognized by the common law or the statute laws of Florida.

2. That the objections made to the jurors, Bull, Shine, and Wilson are not such as the common law, or the statute laws of Florida recognize; *vide* Thomp. Dig., 344. 3 Black. Com., Marginal page 362.

3. *Infamy* and *interest* are the only objections at common law that the court can decide upon. If the objection be to the favor it must be tried by *triers.*

4. It is no answer to the objection to say the defendant in the court below had a jury and a fair trial. The law secures to the parties

a jury selected and empanneled after certain rules and formalities, and the best guarantee for fairness and impartiality is to observe the provisions and requisitions of the law and it is *error* to depart from them. 2 Va. cases, 307.

5. Any departure from the mode pointed out and prescribed by law, for the selection and empanneling of a jury, leaves the matter entirely at the discretion of the court, and is a virtual repeal of the law and the Constitution.

II. Under the 2d error assigned the plaintiff's counsel contend:—

1. That the execution under and by virtue of which the Marshal made the levy in this case, having issued from a court of general jurisdiction, he was not bound to look into the validity of the judgment, or the regularity of the proceedings. He might justify under his writ, and was not required to show an unreversed judgment.—Barker *vs.* Braham and Norwood, 3 Wilson Rep. 375—345. Gott *vs.* Mitchel, 7 Blackford Rep. 270. 5 Hayward 142. 1 Carr. and Payne, 7. 10 John. Rep. 138. 7 Law Lib. 53.

2. If it is replied that the administrators *de bonis non* are *strangers* and therefore it is necessary to show a judgment, it is answered:—1. That the privity which exists between general administrators and administrators *de bonis non,* precludes the idea of their being strangers. 8 Cowen 339—343. 2. To entitle them to the benefit of this argument, they must at the time of the levy, have been wholly *estranged* from the estate. Granwell *vs.* Sibley, Levintz part 2, page 190. 3. That all suits against administrators and executors are virtually proceedings against the estate of their intestate or testator to be administered. The estate is a fund designated by law for the payment of debts, and a judgment binds the estate until reversed, the decedent if alive could not complain if his *property* was taken on an erroneous judgment, and there is no good reason known to the law why his personal representative should be in a better condition. Parker *vs.* Amys, Lev. 26. 1 Kelly's Rep. 82.

3. Manly and wife cannot set up this defence as the judgment was against them in their representative characters, and the decision of the court overruling their plea of discharge in the former suit, was error of the court for which the Marshal cannot be made responsible. 10 Peters 476. 6 Peters S. C. Rep. 16, 17.

4. Moseley having united with Manly and wife (against whom the execution was regular) can have no better claim to maintain this action than his co-plaintiffs.

III. Under the third error assigned the plaintiffs counsel will contend:—

1. That the records of the 18th and 21st of March, 1844, which were given in evidence on the trial below were *res inter alias actor*, the Marshal only acting as the custodian of the Court until a proper and fit person could be appointed as the representative of the estate.

2. Any knowledge he might thus obtain of the situation of the parties, he could not set up in opposition to the mandate of his writ.

3. Notwithstanding their dismissal from the estate, they may have been remitted to their former rights or have retained for the purpose of satisfying this very demand. 7 Blackford 290. 3 Wilson 345, 370.

IV. Under the fourth error assigned the plaintiff's counsel will contend:—

1. That the written pleadings in the case were *res inter alias actor*, the officer was not bound to enquire into the regularity of the proceedings, he was only bound to look to the mandate of the writ. 9 Peters Rep., 624. 3 Wilson Rep., 345, 376. 7 Blackford Rep. 270.

2. If the officer is required to judge of the regularity of the proceedings, to pass upon the ruling, and the decisions of the Court; the effect will be to make the officer an Appellate Court, and the Supreme Court will be in no better condition in this respect than the inferior Courts, and their decrees might have to undergo the like scrutiny;—nothing is better settled than where an officer is required to judge he is not liable for an error of judgment.

V. Under the fifth error assigned the plaintiff's counsel will contend:—

1. That the proceedings had in the Supreme Court in relation to the reversal of the judgment of the Union Bank *vs.* Parkhill's administrators were *res inter alias actor.*

2. That the reversal of the judgment was subsequent to the acts of the Marshal complained of as a trespass, and that said subsequent reversal does not render void those acts which were done under it while it remained unreversed. Ives *vs.* Lucas, 1 Carr. and Payne 7. 7 Blackford's Rep. 270. 3 Wilson's Rep., 345, 376. 6 Peters S. C. Reps. 16, 17.

VI. Under the sixth error assigned the plaintiff's counsel will contend:—

1. That the filing of the Bill in Chancery, by Moseley and his securities was no notice to the Marshal unless service of usbpœna was also proved.

2. That if the Marshal had notice of the filing of the bill, and the refusal of the Court to grant the injunction, it was an additional reason why he should proceed with the levy.

3. That the evidence was no *tendency* to prove the trespass, which was the issue joined, and was therefore improperly received by the Court upon the trial in the Court below. Its effect was to embarrass the jury.

VII. Under the seventh error assigned the plaintiff's counsel will contend:—

1. That the stock note being due, and the interest thereon remaining unpaid, the slaves mortgaged were liable to seizure and sale under a judgment and execution on said stock note.

2. That a failure to pay up the interest and renew the stock note was a forfeiture of the mortgage and a breach of its conditions as contemplated by the charter of the Bank, and the receiving the mortgages in evidence to prove the Marshal a trespasser by levying on mortgaged property was error, vide the opinion of the Court of Appeals in the case of the Bank *vs.* Brown, and the Bank *vs.* Chapman.

VIII. Under the eighth error assigned the Plaintiff's counsel refers to the opinion of the Court below as set forth in the bill of exceptions.

IX. Under the ninth error assigned the Plaintiff's counsel will contend:—

1. That the instructions numbered 1, 2, and 3, should have been given by the Court below as prayed by the defendant's counsel.

2. That the qualification added to them by the Court was not such as the law recognizes.

3. That the only distinction made by the law is in those cases in which the execution issues from a Court of *limited* jurisdiction, and *when* from a Court of *general* jurisdiction.

4. That the qualification set forth in the memorandum, did not apply as the Marshal was no *party to the proceedings,* and to test which he could not maintain an appeal or writ of error to reverse them. On these points see Jacques *vs.* Cesar, 2 Saund. Rep., 101, (y) note 2. 15 John. Rep., 155. 12 John. Rep. 267. 3 Wilson Rep., 345, 376. 2 Wilson Rep., 384. 7 Blackford Rep., 270. 5 Wend.

172. 10 John. Rep., 138. 9 do., 229. Strange 509, 700. Buller's *Nisi Prius*, 83. 2 Term Rep., 653. 6 Peters S. C. Rep., 709. 2 Peters S. C. Rep., 169. 3 Howard S. C. Rep., 762. 2 Howard's S. C. Rep., 743. 10 Peters S. C. Rep., 473.

X. Under the tenth error assigned the plaintiff's counsel will contend:—

That the mortgages having become forfeited by the non-payment of interest, and the failure to renew the stock bond, the mortgagee was entitled to enter and take possession of the slaves, and the Marshal who took possession of the slaves by virtue of an execution in favor of the mortgagee, and with consent of said mortgagee, was no trespasser, see the case of Hawkins and Philips decided at the last term of the Supreme Court.

XI. Under the eleventh error assigned the plaintiff's counsel will contend:—

1. That the acts of Moseley on the day of sale, and previous to the levy, as disclosed by the bill of exceptions taken on the trial, operates as an estoppel *"in pais,"* and precludes his setting up the acts of the Marshal as a trespasser.

2. That if Moseley be, as it is contended he was, a *stranger* to the proceedings under the execution, then his acts renders him a joint trespasser with Camp, and he cannot maintain this action. 3 Wilson, 377.

3. The acts of Moseley ratified the acts of Camp, his assent thereto was equivalent to a command to commit them. 2 Saund. Plea and Ev., Marginal page 865. 1 Forb. Eq. Book 1, Ch. 3, sec. 4. Story's Eq., page 387, note 4. 19 Wend. 557. Smith's Leading Cases on Estoppel *"in pais,"* 554. 2 Murphy's Rep., 6.

XII. Under the twelfth error assigned the plaintiff's counsel will contend:—

1. That the failure of Moseley to forbid the sale of the slaves levied on by the Marshal, to warn the Marshal that he had levied on property to which he, Moseley, had a claim and right of possession, operates as an estoppel *"in pais,"* and he cannot maintain this action.

2. That a levy on the property of an intestate in the hands of his representative is unlike a levy on the property of a *stranger*. The judgment in the former case is against the estate, and to be satisfied out of it. It is a seizure and sale of A's property to pay A's debt. In the case of a stranger it is applying his property to pay the debt

of another. 5 New Hamp., 364. 1 do. 87. 3 Hara. Dig., 6115. 1 Term Rep., 475.

3. That the powers and rights of co-administrators over the estate of their intestate being like that of co-executors, one may release or discharge a debt against the express dissent of the other. So also may the property of the intestate be taken if found in the hands of either to satisfy a debt of the estate. In this case the judgment was against two of the co-administrators, and it was no trespass to take the property if found in the hands of either administrator.—The execution was regular as to Manly and wife, they therefore cannot maintain this action. Moseley by his acts is estopped and he cannot maintain it. 1 Wendell, 583. 1 McCord, 492. Toller on Executors, 408. 11 John. Rep., 22.

XIII. Under the thirteenth error assigned the plaintiff's counsel refers the court to Parker *vs.* Amys, Levintz 261. Granville *vs.* Sibley, Levintz, part 11, page 190.

two dollars and sixty-five cents its interest and damages, making to-will contend:—

1. That the Marshal had no right to decide whether the judgment was rendered against Manly and wife on their old grant of administration, or as administrators *de bonis non.* That as a valid judgment might have been rendered, and one binding on the estate, had they been sued as administrators, without the joinder of Moseley or the description *"de bonis non,"* it is sufficient for his protection, and he is not required to judge whether such a state of things did exist or not. 5 Wendell, 170. Levintz 261. The case of the Marshalsea Coke's Rep., part 10. 9 John. Rep., 229. 10 John. Rep. 138.

Lastly. It may be contended that the Supreme Court of Florida has already decided this judgment to be void, *an utter nullity.* To which we answer:

1. That it was not necessary to the decision of the cause before the court.

2. That the parties themselves did not *elect* so to consider it, otherwise they would have moved to vacate it in the court below, that being the appropriate remedy to set aside a void judgment.

3. That a judgment may be absolutely void as to the *parties* to the action, yet not so in regard to the *acts* of the officer done under it, as in the cases in 7 Blackford and 3 Wilson. In these cases the court say, "though there be no judgment the officer is protected by his writ." In the case of Simms and Wise *vs.* Slacum, the Sup.

Ct. U. S. say, "that a judgment obtained by *fraud* will protect the officer for acts performed under it, though not the parties." 1 Cond. Sp. Ct. Rep., 541.

HAWKINS, J., delivered the following opinion:

The administrator *de bonis non* of Parkhill brought this action of trespass *vi et armis* in the Court below against Camp for seizing, taking, and leading away divers negro slaves, a hundred and eighty in number, the property of the said administrators. They allege in their declaration, besides the trespass, that these slaves were detained and kept by Camp for a long time, whereby great damage accrued to the plaintiff by the deprivation of their services, &c.— The defendant, Camp, pleaded the general issue, and justified himself for the alleged trespass, contending that he had taken the negroes by virtue and force of an execution issued from the late Superior Court of Leon County, at the suit of the Union Bank *vs.* Hiram Manly and wife, administrators of Samuel Parkhill, deceased.

The plaintiff proved by B. W. Gause, that he, Gause, had acted as appraiser of the property of the estate of Parkhill, and had appraised the negroes taken by Camp at the instance of the plaintiffs in 1844 or 1845, and that the negroes afterwards went into possession of plaintiff. Before the sale by the Marshal Camp, a part of the negroes were hired to witness by plaintiffs, and were delivered up to Camp, who informed him that he took them by a precept of the Court. Here the plaintiffs rested their cause, and the defendant offered in evidence the execution before referred to, which is in the words following:

"THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly late Parkhill, and Hiram Manly in right of his wife said Martha Ann, administrators of Samuel Parkhill deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents its debt and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents its interest and damages, making together, the sum of one hundred and twenty-two thousand, one hun-

dred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida, lately on the first day of March, 1845, recovered in our Superior Court for the County of Leon in the Middle District, as well for its debt as its damages, occasioned by the detention of said debt, and likewise the sum of seven dollars eighty-two cents, which to the said Union Bank of Florida, in the same Court adjudged for its costs by it in that behalf expended, together with lawful interest in said damages from the rendition of said judgment till paid, and the costs of this writ, and of your proceedings hereon, and that you have the said sums of money before the Judge of our said Court at Tallahassee, when satisfied to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness, Richard T. Birchett, Clerk, &c."

Upon this writ, Camp endorsed his levy on the negroes alleged by the plaintiff to have been so tortiously taken. The introduction of this writ was objected to by the plaintiffs on the ground that they were strangers to it, and required the original entry and record of judgment to accompany it. The objection was sustained by the Court. Other executions were then offered in evidence, which were in the hands of Camp, the Marshal, at the time of the trespass complained of, and upon which like proceedings were had as on the one already set out. The pleadings and proceedings in these cases were the same, by consent of counsel.

Without intending to discuss all the errors assigned, we will simply take up those which we may deem decisive of the case.

First, therefore, was it requisite and necessary that the record of the judgment upon which the execution issued should have been produced by Camp? Upon a review of the authorities, we are of opinion that the production of the writ merely was sufficient. There are several cases strongly in point as to this question, and we proceed to notice them, premising that they carry with them so high and cogent authority as to remove all doubts as to the correctness of our decision. There is a case in 5th Burrows, 2,631, which assumes the negative of this proposition, but we prefer being guided by the reason and authority of decisions to which our attention has been called, and which we now cite.

In Parsons *vs.* Loyd, 3 Wilson, R. 345, we find the law broadly laid down by Lord C. J. DeGrey, who substantially remarks: Parsons the plaintiff was illegally imprisoned under color of a writ sued out against him, which is a *mere nullity;* he has been unlaw-

fully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law; but is obliged to obey the command of the courts of Westminister, or rather Superior Courts having general jurisdiction, and he may justify, under the writ, *although it be void.* But when the courts has no jurisdiction of the cause, the whole is *coram non judice.* And he further says an action would lie against the *party* suing out such void writ. Citing 1 Levintz 95. 1 Siderfine 272. On page 376, in the same book (Wilson R.) it is further laid down by C. J. De Grey, that a Sheriff or his officer may justify themselves by pleading the *writ only,* because *that* is sufficient for their excuse, although there *be no judgment on record* to support or warrant such writ. But if a stranger interposes and sets the Sheriff to do an execution, he must take care to find a record that warrants the writ and must plead it. So must the party himself at whose suit an execution is made. No trespass is excused but what is inevitable.

Justice Peak in the case of Ives *vs.* Lucas and Thompson, 1 C. & P., 7, holds the following language: "As long as a judgment exists, it protects those who seize property under execution issued under it. And if the judgment is set aside no action lies against the Sheriff for anything done under it, while it remained in existence.—And he further said that the setting aside the judgment did not make the Sheriff's acts void by *relation.*

In Buller's *Nisi Prius,* pages 82 and 83, it is declared that when the *subject matter* of the suit is within the jurisdiction of the court but the want of jurisdiction is as to the person or place, unless the want of jurisdiction appear on the process to the officer who executes it, he is not a trespasser; contrary, when the subject matter is not within its jurisdiction.

The same doctrine is held in Savacool *vs.* Boughton, 5 Wendell 170. Judge Marcy says: "Where the court issuing the process has *general jurisdiction,* and the process is regular on its face, the *officer* is not, though the party may be affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity the party is liable for the acts done under it; but the officer has a protection of his regular writ." Citing 1 Lev. 95. 1 Sid. 272. 1 Stange, 509.

The case just cited was decided upon the following facts as set forth in the pleadings. The plaintiff declared in trespass for as-

sault, battery, and false imprisonment. The defendant pleaded a justification, that he was a constable, by virtue of an execution issued by a Justice of the Peace, on a judgment rendered against the plaintiff, that he arrested the plaintiff and committed him to jail. The plaintiff replied *precludi non* because previous to the rendition of the judgment set forth by the defendant, the Justice who rendered the same did not issue any process for the appearance of him, the plaintiff, in the suit in which judgment was rendered, that the judgment by confession was not entered by the Justice with authority of the plaintiff, nor did the parties in the suit *appear* before the Justice and join issue pursuant to the provisions of the $50 act. To this replication the defendant demurred, and the plaintiff joined in the demurrer.

Here we see that no service of process was effected upon the party; but because the court, although one of limited jurisdiction, had jurisdiction of the subject matter, the officer who executed the process under the judgment, was held justified. And the court cites by way of sustaining its decision the very language hereinbefore set forth, as quoted from page 83 of Buller's *Nisi Prius*.

The case of Goft *vs.* Mitchell, 7 Blackford, 270, confirms this doctrine of holding the officer harmless, and extends it to a case where the Sheriff even *had notice* of the irregularity of the process. The court say: "The writ was legal upon its face, and shewed jurisdiction in the Justice. The law is that a writ having these characteristics, however irregularly issued even though there be no judgment on which to found it, is a justification to the officer acting under it. Nor did the notice given to the defendant before he completed the execution of the writ, affect his authority. He was not bound to look beyond his process. Had he seen fit to assume the responsibility of judging for himself, whether the circumstances under which the writ issued would have excused him for not obeying it, he might have done so, and perhaps the excuse would have been sufficient. But he was not bound to run the hazard."

There might be many other cases cited to shew the soundness of the proposition we have asserted; but will conclude the citations after referring to 546 Comyns Digest, vol. 6, 5th American ed.: "If the defendant justifies by judicial process out of a Superior Court it is sufficient to allege the judgment, writ of *ca. sa.* and warrant thereon to the officer. And the officer himself need not *allege the judgment,* only the writ and warrant." 3 Lev. 20. 1 Salk. 409.—

See also 10 John., 138. 10 Coke, 76, case of the Marshalsea, 10 Peters U. S. Rep., 476. 6 Peters, 17. 1 Levintz 95. Ib. 173.

From these authorities it would seem there is a distinction taken as to the protection afforded a party and the officer executing the process of the court, the one being supposed to act in accordance with his volition and consequently amenable for acts done voluntarily, the other from a coercion arising from, and incident to the mandate of the writ of process directed to him. The Sheriff is a ministerial officer, and no action should lie against him merely in discharge of his duty, unless he exceed that duty when he becomes liable as a party. He is protected in the execution of process emanating from a court of general jurisdiction, provided there appears on the face of the process that the court has jurisdiction of the *subject matter* (5 Wendell 170,) nor was it for Camp to decide whether the judgment rendered against Manly and wife, administrators, was erroneous or void, regular or irregular. The judicial power of a Sheriff in this country is still less than in England, and his duty is obedience to the process of the court.

This principle is illustrated in 6 Harrison and Johnson 301. The action was trespass against the Sheriff. Property was attached by him, under writs from the creditors of M. No person appeared to defend the suit, the property was condemned, *fieri facias* issued and sale. R. had notice of the service of the attachment, and at the *time of service* had notified the Sheriff of his claim to the property attached, and brought his action of trespass against the Sheriff. The court held that the Sheriff was not responsible for a *tort* which as a public officer he is bound to perform—that he acted in obedience to the mandate of the law, and it would be strange if the law whose mandate he obeyed should make him responsible for such obedience—that the party in this case had notice of the attachment and had a right to appear in court, and move to quash it. Indeed so far is this doctrine of protection to the officer carried that in 1 Levintz 95, we find that even after *judgment vacated*, the officer is excused for executing the writ, and in 3 Cranch 300, it is laid down by Judge Marshal that a judgment obtained *by fraud* will protect the officer for acts done under it, though not the parties.

It must be conceded we think that the writ in this case was legal on its face, shewing jurisdiction of the court as to the subject matter of the suit, issued from a court of general jurisdiction at a proper time and returnable in accordance with law, and it would be

going too far to adjudge that the Sheriff should be held responsible for any error of the court, which rendered the judgment under which execution issued. Nor can we well perceive how the Sheriff was a *party* to the proceedings had in the court, in the case of the Union Bank and the administrators of Parkhill. It is true that a Bill in Chancery is introduced in the bill of exceptions, in which bill Camp is one of the defendants, but there is no evidence that Camp had legal notice of the filing of the bill for an injunction. And supposing he had and the injunction was refused, could he not with propriety have taken the action of the court as his guide and regarded it *pro tanto* as another judicial decision, as to the regularity and legality of the judgment rendered against the administrators of Parkhill. So too with the order of the court, that the property of the estate of Parkhill be taken possession of by Camp, and that the letters of administration granted to Martha Manly be revoked. All this took place before the judgment rendered against Manly and Wife as general administrators, and though Camp may have had notice, still it would be inequitable and impolitic to have required Camp to look behind the judgment, and to hold him responsible for what was the error of the court. These proceedings too were collaterally drawn in question in the court below, and in the case of Tolmer *vs.* Thompson, 2 Peters 163, the court say: That proceedings brought before a court collaterally, "are by no means subject to all the exceptions which might be taken on a direct appeal. They well may be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears on the face of them, that the *subject matter* was within the jurisdiction of the court they are voidable only. The errors and irregularities if any exist, are to be corrected by some direct proceedings either before the same court to set them aside, or in an appellate court. If there is a *total want* of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question."

In Voorhees *vs.* the Bank of the United States, 10 Pet. 474, the court say: "If the validity of a sale under its process, can be questioned for any irregularity *preceding* the judgment, the court which assumes such power places itself in the position of that which ren-

dered it, and deprives it of all power of regulating its own practice or modes of proceedings in the progress of a cause to judgment."

The next question arising for the consideration of the Court is, should the plaintiff in the Court below have been estopped from a recovery against Camp, owing to the admissions and conduct of Moseley one of the parties. It is not the intention of the Court to go any length into the doctrine of *estoppel in pais,* which has been so ably and learnedly argued in this and another case at bar during the term, but simply to advert to some of its general principles. We find while other classes of estoppels have not received much or great favor from the Courts those *in pais* have been much extended and received a liberal, enlarged and we might add an enlightened construction. The technicalities incident to estoppels are gradually giving way to considerations of reason and practical utility, and the Courts of the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality.

In the case of the Welland Canal Company *vs.* Hathaway, 8 Wendell, 483, Judge Nelson remarks that the acts and admissions of a party operate against him in the nature of estoppel "when in good conscience and honest dealing he ought not to be permitted to gainsay them." In Stevens *vs.* Baird, 9 Cowen, 274, the Constable had an execution against Benedict, and Stephens pointed out to the officer a quantity of lumber, one-fifth of which he said belonged to Benedict. On the levy being made, a receipt for the property was made by Stephens, which was afterwards sold under the execution, Baird becoming the purchaser, Stephens standing by at the sale and giving no notice of his claim to the whole property. In a suit between Stephens and a purchaser it was held that Stephens was estopped from denying that Benedict owned one-fifth part of the lumber.

In Gregg *vs.* Wells, (10 Ad. and Ellis, 90,) it was held that if the owner of the goods stand by and voluntarily allow another to treat them as his own by which means a third person is induced to purchase them *bona fide* the former cannot recover them from the purchaser. Lord Denman said in this case: "A party who *negligently* or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has assisted in deceiving." "The party is only concluded against shewing the truth, or asserting his legal rights when that would

have the effect of doing a wrong through his means to some third person." Hill Rep., 225.

Admissions arising from demeanor and conduct are conclusive against the party, where he has received a benefit therefrom or prejudiced another. 2 Saunders Pl. and Ev., 55. Mr. Starkie in his work on Evidence, vol. 2, 37, uses this language: "In general admissions may be presumed not only from the declarations of a party, but even from his acquiescence or silence, as for instance, when the existence of a debt or a particular right has been asserted in the presence of a party, and he has not contradicted it, such acquiescence and silence will amount *prima facie* to an admission of a debt or right. So an acquiescence and endurance where acts are done by another which if wrongfully done are encroachments and call for resistance and opposition, are evidence of a tacit admission that such acts could not be legally resisted."

Now what has been the conduct of Moseley in relation to the alleged trespass of Camp. The evidence shews that when he, Camp, proceeded to make the levy under the excution, a list of the negroes was furnished him by Moseley. There was no denial on his part as to the right of Camp to levy. There was indeed more than mere "acquiescence or silence," the furnishing the list was an affirmative act, and not merely negative—it enabled Camp to carry out the levy in thus virtually designating the slaves to be levied upon. He stands negligently by and there is a degree of negligence amounting to culpability, and allows the Marshal to make the levy, so far as appears by the testimony without protest or dissent.

It is not contended that the conduct of Moseley was fraudulent or wilfully intended to deceive Camp, but still we must in accordance with the principles laid down, ask if it was such as to produce erroneous impressions on the mind of Camp, as to his future movements in relation to the levy. There is no claim put in for the negroes by virtue of our statutes, and at the sale Moseley took an active part, assisting the Marshal, and made no dissent to the sale; but advised people to bid, and when the sale was forbade by Archer he disapprobated the act, and it appears too that the Marshal acted in accordance with the views of Moseley as to the details of the sale. Taking his whole conduct together, his acts, admissions, and declarations at the sale, it is very evident they are clearly inconsistent and at variance with the claims he now asserts. It is true the

levy was the trespass if any was committed, and no claim was asserted at the time; but there is direct connivance—the possession of the negroes by Camp was a continuing trespass and acquiesced in by Moseley. Ought he not now to be estopped from gainsaying his admissions, and when too he stood negligently by and allowed a person to do an act which he might not have done had he received any indication that he would be held legally responsible for that act? We think he should be, and that Camp should not be amenable as a trespasser.

The effect of an estoppel, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court, and not of fact for the jury. 2 Smith's Leading Cases, 469, citing Lewis *vs.* Carstair, 5 Watts and Sergeant, 209, and we therefore think the court erred in leaving the admissions of Moseley to the jury.

It is contended that even allowing the admissions of Moseley they cannot affect the rights of his co-administrator and administratrix. But if there are several administrators they are regarded in the light of an individual person. "They have a joint and entire interest in the effects of the intestate, which is incapable of being divided, and in case of death such interest shall vest in the survivor without any new grant from the court." 1 Williams on Executors, 591. Acts done by one of several executors or administrators relating to the delivery, sale or release of the testator's or intestate's goods are the acts of all. Wheeler *vs.* Wheeler, 9 Cowen, 34.—So two or three executors or administrators may compromise a claim and release a debtor to the estate without the concurrence and contrary to the express wish of the other. Murray *vs.* Blatchford, 1 Wendell, 583. There was formerly a distinction as to the acts and powers of administrators and executors, on the ground that the executor derived his authority from the act of the deceased, while the administrator derived his from the Ordinary, his appointment being considered in the light of an office. But these distinctions have been overruled, and now joint administrators stand upon the same footing as executors, 407 Toller on Ex. 1 McCord, 492.—We deem it unnecessary to proceed further in the consideration of the case either as to the instructions given or those refused, being satisfied that the judgment of the court below should be reversed.

WYLIE BLEWITT, ADMINISTRATOR OF ARABELLA BLEWITT, DECEASED, *vs.* JAMES NICHOLSON AND WILLIAM N. AVERITT, EXECUTORS OF MALCOLM NICHOLSON, DECEASED..

A grant of administration in this State to the husband by virtue of his marital rights upon the estate of the wife, she being a non-resident at the time of her death, and dying in another State, but entitled to effects and property in this State, is valid under our laws.

Appeal from a Decree in Chancery rendered in Gadsden.

Carmack & Baker, for Appellant.

Thompson & Dupont, for Appellee.

HAWKINS, J.:

There was a bill filed in the court below by Blewitt, appellant, the administrator of his deceased wife, to recover property alleged to belong to her in the hands of the executor of her father Malcolm Nicholson.

The bill states that the said Malcom Nicholson died, leaving a will dated 18th November, 1838, and of which James Nicholson and William N. Averitt, were appointed executors, and to whom letters testamentary were duly granted. That in the year 1844, Blewitt (the appellant and complainant) intermarried with Arabella the daughter of the said testator, and that after the death of her father she removed to the State of Georgia where she resided up to the time of her death, which occurred in December, 1844.

That on 8th January, 1845, letters of administration were granted to the complainant Blewitt by the Judge of the County Court of Gadsden county, and that Arabella, together with the other children of the said Malcim Nicholson, and his widow, were devisees under the will of the said Malcolm, by which they were entitled to an equal share of the real and personal estate remaining in the hands of the said executors after the deduction of the specific legacies, and that these portions with the exceptions of such assets as have been handed over to Mary, the wife of said Malcolm, were in the hands of said executors and within the jurisdiction of the court. The bill charges that the complainant as administrator of his wife had made

demand upon the said executors, requiring of them a specific performance of the trust under the will of Malcolm Nicholson, requiring them to set apart and deliver to him the complainant, as administrator, the portion and share his late wife had been entitled to in the estate, but that they refused to do so.

It is admitted in the answer that Malcolm Nicholson died and left a will and that it was admitted to Probate as alleged in the bill, and that the respondents James Nicholson and W. N. Averitt duly qualified as executors, that Arabella, the late wife of complainant was one of the children of said Malcom Nicholson, and a beneficiary under his will. That sometime after the death of her father she went to the State of Georgia with a view of visiting her mother, who had removed to that State, and that while upon this visit she intermarried with the complainant, and for anything that the defendants knew to the contrary, continued to reside with him as his wife up to the time of her decease, which occurred about the time mentioned in the bill of complaint. That no partition or apportionment of the estate of her father had been made to her prior to her death, nor has any been made to any of the children up to the (then) present period. Without denying the grant of letters of administration to complainant, the defendants in substance contend, that if Arabella the wife of complainant, was at the time of her decease a citizen of the State of Georgia and died within its limits, then that the alleged grant of letters of administration to complainant was null and void, and conferred no right upon complainant to maintain his bill of complaint as administrator in right of his late wife, the said grant being in derogation of the Laws of the State.

To this answer there is a general replication.

It will be seen upon this statement of the pleadings thus succinctly made, that the following proposition is brought directly before the court for its decision.

Is a grant of administration valid by our law when made to the husband by virtue of his marital rights upon the estate of the wife, she being a non-resident at the time of her death and dying in another State, but entitled to property and effects within the limits of the State of Florida.

The negative of this proposition is assumed by the counsel for the appellee and it is contended that the grant of administration to Blewitt is void, because the court which made it was one of limited jurisdiction, a creature of the statutes, and if not embraced within

these statutes, the act of the court in making the grant was a nullity, and that the Judge of the County Court of Gadsden has transcended his powers in making the grant for the above reasons. There can be no doubt as asserted, that a court of limited jurisdiction must strictly pursue the authority conferred by the power creating it, and that when its jurisdiction is defined, any act transcending the limits or boundaries of that jurisdiction is void. It is proper too that these courts should be kept and restrained within the jurisdiction delegated to them. They resemble special agents, possessing certain specific powers, but when these are not exceeded their decisions are as conclusive (until reversed by an appellate and superior tribunal,) and carry with them the same force as courts of general jurisdiction.

It would of course be exceedingly improper to clothe these limited tribunals with constructive powers, or such as are not literally or virtually given them; but at the same time we must be careful not to deprive them by a too rigid or refined construction of that authority which is requisite and necessary to carry out the end and purpose of their creation, or is incident to grant of power specifically or generally conferred.

While admitting the correctness of the proposition of the counsel for the appellee in the abstract, we are compelled to deny its application to the case at bar.

It is very true as alleged, that our statutes in relation to the granting of letters of administration do not expressly *or totidem verbis* provide for the case of a person dying beyond the limits of the State, or who was a non-resident at the time of his death, and who may have been entitled to goods, chattels or lands within this State. This may or may not have been a *casus omissus*, though it no doubt was; but we think the enquiry unimportant, as we deem all cases of the nature above alluded to, fully provided for and embraced in the grant of jurisdiction to the Judges of the County Courts under our Territorial Government.

By the eighth section of the act, passed February 17th, 1833, it was enacted, that the Judge of each County Court, "shall have power either in open court or in vacation, to take the probate of wills, grant and revoke letters, testamentary, and letters of administration, appoint and displace guardians of infants, orphans, idiots, lunatics, and persons *non compos mentis*, and to make all necessary orders for issuing of process and notices. The letters testamentary or of ad-

ministration so granted by the said Judge shall be issued by the Clerk and bear teste in the name of said Judge. That said Judge shall also have power to order sale and distribution in all cases according to laws of estates, testate or intestate, and shall *have and exercise general powers* as a *Judge of Probate,*" Duval's Comp., 276. By the 4th section of the law of 1828, it is enacted "That it shall be the duty of the County Courts, in the several Counties in this Territory in term time, and of the Judge of said Courts in vacation, to take proofs of all last wills and testaments, and to grant probates, letters testamentary, and letters of administration, with or without any will annexed, and to do and perform all matters and things enjoined on said Courts, or the Judges thereof in vacation, to the estates of deceased persons." Duval Comp., 168.

Let us cast an eye to the jurisdiction of the courts of ordinary in England, and we will find a strong similitude to those of the late Judges of the County Courts. In ancient times, by the English law, when a man died without making disposition of such of his goods as were testable, the King as *parens patriae* used to seize the goods of the intestate to the intent that they should be peserved for the burial of the dead, the payment of debts, and the advancement of the family. This prerogative of the King was exercised for some time by his own minister of Justice, and probably in the County Courts, besides being delegated as a franchise to many lords of manors and others who possess this right of granting administration by prescription.

This same power was afterwards granted to the prelates, who on account of their superior sanctity were conceived capable of disposing of the property most for the spiritual benefit of the deceased. The goods of the intestate being thus vested in the ordinary, as trustee, to dispose of them for pious uses, the clergy took to themselves the residue of the deceased's estate, after the *partes rationalibus* of the wife and children had been deducted, without even paying his lawful debts.

To remedy this, the statute of Westm. 2, (13 Ed. 1st. C. 19.) was passed, declaring that the ordinary should be bound to pay the debts of the intestate, as far as his goods extended. Still however, the residue after the payment of debts remained with the ordinary, and as a remedy for this evil the statute of 31st Edward 3, was passed providing that the ordinary should depute the next and most lawful friends of the deceased intestate to administer his goods, to demand

and recover as Executors the debts due the intestate, and to be accountable to the ordinaries as executors were. The administrattors were the officers of the ordinary, appointed by him in pursuance of this statute, and their title and authority were derived from the ecclesiastical Judge by grants which are usually denominated letters of administration. 1 Williams on Ex., 236-7-8. Toller on Ex., 56. 2 Black. Com., 495.

In giving this brief sketch of the rise and history of administration, we are not to be understood as asserting that the ecclesiastical law *as such* is in force in Florida by virtue of any of our statutes, which have adopted the common law of England, and statutes of a general nature down to the 4th of July, 1776; but so far as "the law prevailing in the ecclesiastical courts on the subject of wills, executors, and administrators, was by various English statutes, and by recognition in the English Courts, part of the law of England," it would follow that it was embraced by our statutes. Preface to Swinburn on wills—cited by a member of this court on page 380, of 1st Florida Reports. There is certainly a strong analogy between the powers, duties and jurisdiction of an ordinary of England, and those conferred upon the Judges of the County Courts under the Territorial *regime*, and now appertaining to the Judges of Probate of the State. It is true that these grants of power are derived from different sources—in England all judicial power emanating from the Crown—in our Country from the people conferring it through their constitutions and statutes. This analogy as to the jurisdiction of these tribunals being established there would seem to be as much propriety in following the decisions of the ecclesiastical courts of England when applicable to the subject matter in dispute, and when not conflicting with our statutes, as those of her courts of common law.

We cannot see that there is any valid objection to the granting of letters of administration by the Judge of the County Court of Gadsden County to the complainant Blewitt. The non-residence of his wife at the time of her death is not such a disability as to prevent the granting administration. The case of *Griffith vs. Griffith*, Sayer 83, cited on page 188 of 1st Williams on Executors, decides and sustains this principle. "This was an action of debt by an administrator, and it appeared by the declaration, that her letters had been granted by the Bishop of Bristol; the defendant pleaded that the deceased died upon the high seas, out of the jurisdiction of the Bishop

of Bristol, and that the letters of administration were therefore void." Upon demurrer the letters were holden good, and Lee, C. J., said that the right of granting letters of administration is not founded upon the dying of an intestate within a diocese; but upon his leaving goods there." Soo too it is laid down in the same work (285, 1st Williams on Ex.:) "If the intestate was domcilied in a foreign Country, within the kings dominions out of England, and left assets in this Country, administration must be taken out here, as well as in the County of domicile." And in the case of Scarth vs. the Bishop of London, 1 Hagg., 625, Sir John Nicoll held that though there were some *dicta* to the effect that the bishop had no jurisdiction where the party does not *die* within his diocese, and that his death within the diocese is essentially necessary to found his jurisdiction, yet such authorities were not sufficiently clear to induce the court to overturn the established practice."

These and other cases which might be cited, establish the principle that the question of jurisdiction as to the granting administration is made to depend on the locality of the property at the time of the death of the intestate, when it occurs beyond the limits of the State, and that the grant in such a case is not null or void, but good and valid.

While our statutes are silent as to the granting of administration when the death occurs beyond the limits of the State, and only provide in such cases for the Probate of wills, still there is no restriction prohibiting such administration, and we have already given our opinion that this omission is cured by the general grant of power to the Judges of the County Courts. The words "the Judge shall have and exercise *general powers* as Judge of Probate," seem clearly to confer a plenary and general jurisdiction upon the subject of administration. The statute provides that if a person die out of the Territory (State) without property therein, but with debts due to such person by persons living in the Territory, letters testamentary or of administration, may be granted for the collection of such debts. We cannot think that the Legislature after the passage of such a law ever intended that administration should be refused in cases where there was property real and personal to be administered. It is contended however that there was design in the Legislature in not thus providing for this case, because we have a statute enabling executors and administrators who shall produce probate of wills or letters of administration authenticated under the

act of Congress of 1790, shall be authorized to maintain actions in the several courts of the territory, under the same rules and regulations as other plaintiffs. Duval 105. Thomp. Dig. 349. But this law was passed in 1829, a year after the law directing the granting of probate and administration, and we are informed too, that this law was passed in the first place, many years anterior to 1828, the time of its re-enactment. It is very possible that the law of 1829, was passed to remedy the omission of the law of 1828 and to a certain extent may be said to do so, but still it takes away no jurisdiction previously conferred upon the County Judge. But we think the better opinion is that the intention of the Legislatue in passing the law of 1829 was for another purpose. "It is the general doctrine of the common law (says Judge Story) recognized both in England and in this country, that no suit can be brought or maintained by any executor or administrator, or against any administrator or executor in his official capacity in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration therein granted him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration and give new security according to the general rules of law prescribed in that country before the suit is brought." Story conflict of Laws, 421-2. We think therefore that for the purpose of obviating this necessity of taking out new or ancillary letters of administration, that the law of 1829 was passed, enabling foreign executors or administrators to maintain suits directly upon complying with the requisitions of the statute.

Nor can we deem the administration granted in this case void because made to a non-resident. The statutes have not made non-residence a disqualification, and it is expressly declared, that "letters of administration shall be granted to the representatives of the intestate who apply for the same, preferring first the husband or wife."—Thompson Dig. 196. By the law of England it is no incapacity to be an administrator that the next of kin is an alien. 295 Williams on Executors. Comyns Dig., Administrator B. 6.

The letters of administration granted to complainant stand unrevoked and in full force, and unless a clear case is made out of want of jurisdiction in the officer granting them, we cannot disturb them, but must presume that all the doings of the Judge in the prem-

ises, being within the scope of his jurisdiction, were *reta acta* and in accordance with law.

Per Curiam:—It is therefore ordered, adjudged and decreed, that the decree rendered in the court below be reversed, and the cause be remanded higher for further proceedings in accordance with principles of law and equity.

WILLIAM G. PONDER, APPELLANT, *vs.* WM. D. MOSELEY, MARTHA ANN MANLY, AND HIRAM MANLY *de jure uxoris*, ADMINISTRATORS. *de bonis non* OF SAMUEL PARKHILL DECEASED, APPELLEES.

To authorize the assertion that a judgment is void it must have emanated from a court of limited jurisdiction not acting within its legitimate prerogative or from a court of general jurisdiction where the parties are not actually or by legal construction before the court and subject to its jurisdiction.

Judgments of court of general jurisdiction are not considered under any circumstances as mere nullities, but as records importing absolute verity, and of binding efficacy until reversed by a competent appellate tribunal. They are voidable, not void.

The title of a purchaser at a sale under execution issued from a court of general jurisdiction, is not affected by a subsequent reversal of the judgment on which the execution was based.

B. a creditor sued M. and M. administrators of the debtor. The defendants pleaded in bar. Afterwards the letters of M. and M. were revoked; and subsequently M. and M. and *another* were appointed administrators *de bonis non*. M. and M. pleaded their dismissal in bar *quis darrien continuance*. The plaintiff replied the re-appointment of M. and M. The defendants rejoined that although reappointed with *another* as administrators *de bonis non*, a judgment had been recovered against them in their *new* character sufficient to cover the assets in their hands. The plaintiff then demurred, and judgment was rendered in favor of the plaintiff against M. and M. as administrators. Execution was issued to be levied of the goods of P., the intestate, in the hands of M. and M. as administrators. Under this execution the officer levied on the property of P., the intestate, in the hands of the administrators, *de bonis non*, and a sale was made. After the sale M. and M. sued out a writ of error from the Supreme Court, and the judgment was reversed. Held that the purchaser at this sale acquired a good title.

The doctrine of estoppel in *pais* laid down in Cotten *vs.* Williams, and Camp *vs.* Parkhill's administrators decided at this term, approved.

Appeal from Leon Circuit Court.

William G. Ponder, vs. W. D. Moseley and others, Administrators.

The appellees as administrators *de bonis non*, instituted an action of detinue against the appellant in Leon Circuit Court to recover sundry slaves in the possession of defendant below, alleged to be the property of Samuel Parkhill, deceased.

The declaration contains two counts in usual form—one alleging a delivery by plaintiffs and a detention after demand—the other a finding by defendant and a like detention.

The defendant pleaded three pleas:

1. *Non detinet.*
2. That the slaves were not the property of plaintiffs.
3. That plaintiffs were not lawfully possessed of the negro slaves.

Upon these the plaintiffs joined issue.

The plaintiffs to maintain the issues joined on their part, offered the following evidence and testimony.

First, It was admitted by defendant's counsel that the plaintiffs were administrators and administratrix of the estate of Samuel Parkhill left unadministered, as set forth and stated in the declaration filed herein.

The said plaintiff then introduced Thomas Brown, who being duly sworn as a witness, deposed as follows: Being shewn three paper writings, says they are appraisements of the slaves of plaintiffs intestate.

Witness was one of the appraisers to appraise the slaves of Intestate's estate; saw the slaves in these papers enumerated, exhibited as the property of said estate, on the plantation of the plaintiff's intestate. They were then in possession of one of the plaintiffs as administratrix of intestate. Does not know what became of these slaves, except from having occasionally seen some of them since. There was one slave named *Juba* there exhibited, appraised at three hundred and fifty dollars; another *Caroline*, at five hundred and fifty dollars; another *Jane*, at two hundred and fifty dollars; another *Frank*, at two hundred and fifty dollars; another *Margaret*, at two hundred dollars—this last slave was named in another and late inventory; another slave *Albert*, appraised at one hundred and fifty dollars; another, *Anderson*, at one hundred dollars; another *Pleasant*, at fifty dollars. Thinks slaves have advanced in value since that time twenty-five per centum. Does not know that he has ever seen the above named slaves since. Knows nothing personally of any sale of these slaves.

Cross examined.—Says he does not know that the slaves above named are the same that are now claimed from defendant.

The said plaintiffs then offered in evidence the record, and pleading and entry of the judgment in favor of the Union Bank of Florida, against Manly and wife, administrators of Parkhill the execution issued thereon, the levy and return, or report of the sale of the slaves levied on by John G. Camp, Marshal of Middle District of Florida, to wit:

At a Superior Court for the county of Leon, continued and held at the Court House in the city of Tallahassee, on Saturday, the 1st day of March, A. D. 1845,

Present, the Honorable SAMUEL J. DOUGLAS, Judge.

Union Bank of Florida, *Plaintiff*,
vs.
Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife Martha Ann, adm'rs of Samuel Parkhill, dec'd, *Defendants*. } In debt.

This day came the parties by their attorneys, and the plaintiff by his attorney, filed his special demurrer to the defendant's rejoinder to the plaintiff's replication filed herein to the defendant's amended plea *puis darrien continuance* filed by leave of the Court on the 24th February last, in which demurrer the defendants joined.—Whereupon the matters of law arising upon the plaintiffs' demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder, and the matters and things therein alleged, are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the said defendants, therefore it is considered by the court that the said plaintiff recover against the said defendant the sum of $94,182 22-100 parcel of the debt in the declaration mentioned, and the sum of $27,982 65-100 its damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the said intestate, Samuel Parkhill, dec'd, in the hands of the defendants to be administered, and the said defendants in mercy, &c.

THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you, that of the goods and chattels, slaves, lands tenements of Samuel Parkhill, deceased, in the hands of Martha

Ann Manly, late Parkhill, and Hiram Manly, in right of his wife said Martha Ann, administrator of Samuel Parkhill, dec'd, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the first day of March, 1845, recovered in our Superior Court of the county of Leon, in the Middle District, as well for its debt as its damages occasioned by the detention of said debt, and likewise the sum of seven dollars and eighty-two cents, which to the said Union Bank of Florida, in the same court adjudged for its costs by it in that behalf expended, together with lawful interest on said damages from the rendition of said judgment till paid, and the costs of this writ and of your proceedings hereon, and that you have the said sums of money before the Judge of our said court at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, Clerk of our said court, at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the Independence of the United States the sixty-ninth year.

[SEAL.] R. T. BIRCHETT, Clerk.

This execution was levied on certain slaves of the estate, and at the sale the defendant purchased the slaves mentioned in the declaration.

Defendant by his counsel objected to the introduction thereof as evidence before the jury, but the court overruled the objection, and thereupon the same were read to the jury and the defendant by his counsel excepted.

The said plaintiff then offered in evidence two paper writings purporting to be bills of sale by John G. Camp, M., to defendant of certain slaves named in the declaration, which said writings had been obtained from defendant by notice and rule as prescribed by statute.

Know all men by these presents, that whereas, by virtue of several executions issued out of the Clerk's office of the Superior Court of the Middle District of Florida, for Leon County, wherein the Union Bank of Florida and others are plaintiffs, and the administrators of Samuel Parkhill, deceased, are defendants, I did, as Mar-

shal of said District levy upon the hereinafter described negro slave Caroline as the property of the said Samuel Parkhill, deceased, to satisfy said writ; and whereas, the said negro slave was by me this day exposed for sale at public auction, according to the statutes in such case made and provided, and sold to William G. Ponder for five hundred and thirty-five dollars, being the highest sum bid for the same; Now know ye, That I, John G. Camp, Marshal of said District, by virtue of the said writs of execution, and by force of the statutes in such case made and provided, in consideration of the said sum of five hundred and thirty-five dollars, to me in hand paid by William G. Ponder, the receipt whereof is hereby acknowledged, have granted, bargained, sold and transferred, and by these presents do grant, bargain, sell and transfer to the said William G. Ponder, his heirs, executors, administrators, and assigns forever, the negro slave named Caroline, and all the right and interest which the said Samuel Parkhill, deceased, had in or to the said named negro, to have and to hold the said negro unto the said William G. Ponder, his heirs, executors, administrators, and assigns, as fully as I, the said John G. Camp, as Marshall as aforesaid, under the authority aforesaid might or ought to convey and sell the same. In witness whereof, I have hereunto set my hand and affixed my seal this fifth day of May, Anno Domini, 1845, and of the Independence of the United States the sixty-ninth year.

JOHN G. CAMP, [L. S.]
Marshal.

Know all men by these presents, That whereas by virtue of sundry executions issued out of the Clerk's office of the Superior Court of the Middle District of Florida for Leon County, wherein the Union Bank of Florida and others are plaintiffs, and the administrators of Samuel Parkhill, deceased, are defendants, I did, as Marshal of said District, levy upon the hereinafter described negro slaves, to wit: Juba, Jane, Frank, Margaret, Albert, Anderson, Pleasant, as the property of the said Samuel Parkhill, deceased, to satisfy said writ; and whereas, the said negro slaves were by me this day exposed for sale at public auction, according to the statutes in such case made and provided, and sold to William G. Ponder for fifteen hundred dollars, being the highest sum bid for the same: Now know ye, That I, John G. Camp, Marshal of said district, by virtue of the said writs of execution, and by force of the statutes in such case made and provided, in consideration of the said sum of fifteen

hundred dollars to me in hand paid by William G. Ponder, the receipt whereof is hereby acknowledged have granted, bargained, sold and transferred, and by these presents do grant, bargain, sell and transfer to the said William G. Ponder, his heirs, executors, administrators and assigns forever, said negroes named as above, and all the rights and interest which the said Samuel Parkhill, deceased, had in or to the said named negroes, to have and to hold the said negroes unto the said William G. Ponder, his heirs, executors, administrators and assigns as fully as I, the said John G. Camp, as Marshal as aforesaid, under the authority aforesaid, might or ought to convey and sell the same. In witness whereof, I have hereunto set my hand and affixed my seal this sixth day of May, Anno Domini, 1845, and of the Independence of the United States the sixty-ninth year.

JOHN G. CAMP, [L. S.]
Marshal.

The said Plaintiffs then offered to read in evidence the entry of the Judgment of the Superior Court of the Middle District of Florida upon an appeal from an order of the County Court of Leon County removing Mrs. Martha A. Manly from the office of administratrix of Samuel Parkhill, deceased, to wit:

At a Superior Court for Leon County continued and held at the Court House in the City of Tallahassee, on Monday the 18th day of March, A. D. 1844: Present the Honorable Samuel J. Douglass, Judge.

In the matter of the Estate of Samuel Parkhill, dec'd. } On an appeal from an order of the County Court of Leon County revoking the administration of Martha Ann Manly late Martha Ann Parkhill.

This cause coming on to be heard anew upon the merits, and it appearing to the satisfaction of the court that Henry Bond, Richard K. Call, George K. Walker and Benjamin W. Gause, the securities upon the official bond of said Martha, are insufficient: It is therefore ordered that the judgment and decree of the County Court be affirmed and that the letters of administration heretofore granted to the said Martha be and remain revoked, annulled and set aside. It is further ordered that John G. Camp, Esq., Marshal of the District of Middle Florida, do take the property of the said estate of Samuel Parkhill in his possession to remain there till the further order and direction of this court.

To the introduction of which defendant by his counsel objected, but the court overruled the objection, and allowed the evidence to go to the jury, and defendant by his counsel excepted.

The said plaintiff then proved that the term, "sundry executions issued out of the Clerk's office," as stated in the bills of sale referred to and given in evidence were the following:

Execution	No.	3278	in favor of	C. B. Bioren.
"	"	3279	"	George B. Pease.
"	"	3280	"	Ann Davidson.
"	"	3281	"	R. T. Birchett, assignee.
"	"	3282	"	Same.
"	"	3283	"	Richard A. Saunders.
"	"	3284	"	P. Philips.
"	"	3285	"	Moore and Monford.
"	"	3286	"	William Fisher.

All against Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased.

It was admitted by defendant's counsel that these were executions issued on the same day, and on judgments rendered at the same term, and on the same pleadings as the case of the Union Bank against Manly and wife, administrators of S. Parkhill.

The said plaintiff also introduced and read to the jury the mandate of the Supreme Court, reversing the judgment rendered in the Superior Court at the suit of the Union Bank of Florida against Martha Ann Manly and Hiram Manly, administrators of the estate of Samuel Parkhill, deceased, and the entry of this court thereon dismissing said suit.

The said plaintiffs then offered to introduce in evidence the original deeds of mortgage executed by Samuel Parkhill in his life time to the Union Bank of Florida, (nine in number,) to secure his shares of stock in said Bank, with the view of proving that the slaves in suit were embraced in said mortgages, &c., &c., to the introduction of which evidence the defendant by his counsel objected, but the court overruled the objection and the defendant excepted to the decision, and thereupon, an abstract of the said mortgages which it was agreed should stand in lieu of said original deeds, was given in evidence to the jury, to wit:

STOCK MORTGAGES.

Memorandum of Samuel Parkhill to the Union Bank of Florida: 19 March, 1835—N. E. 1-4 Sec. 3, T. 1.

William G. Ponder, vs. W. D. Moseley and others, Administrators.

E. 1-2 N. W. 1-4 Sec. 3, T. 1.
W. 1-2 N. W. 1-4 Sec. 2, T. 1.
S. E. 1-4 Sec. 34, T. 2, R. 2, N. & E.
E. 1-2 S. W. 1-4 Sec. 34, T. 2, R. 2, N. & E.
W. 1-2 N. E. 1-4 Sec. 34, T. 2, R. 2, N. & E.
S. W. 1-4 Sec. 35, T. 2, R. 2, N. & E.

For fifty shares. 50.

1 February, 1837.—N. W. 1-4 Sec. 31, T. 1, R. 4, N. & E.
E. 1-2 S. E. 1-4 " " " "
E. 1-2 S. E. 1-4 Sec. 36, T. 1, R. 3, N. & E.
W. 1-2 S. W. 1-4 Sec. 31, T. 1, R. 4, N. & E.
W. 1-2 S. E. 1-4 Sec. 36, T. 1, R. 3, N. & E.

Slaves—Homidy, Doll, Elias, Sarah, Hagar, Elizabeth, Sam, Johnny, Juba, Jane.

For sixty shares. 60.

(Note—The Land with 31 shares transferred to H. J. Mills.)

7 March, 1838—Remortgage of the property in the two preceding mortgages for forty-one shares. 41.

(Note—13 shares transferred to H. J. Mills.)

16 May, 1838—N. E. 1-4 Sec. 33, T. 2, R. 2, N. & E.
E. 1-2 N. W. 1-4 Sec. 33, T. 2, R. 2, N. & E.
N. W. 1-4 Sec. 34, " " "
S. E. 1-4 " 33, " " "
South 1-2 " 34, " " "
S. W. 1-4 " 35, " " "
W. 1-2 N. W. 1-4. Sec. 2, T. 1, " "
N. E. 1-4 " 3, " " "
E. 1-2 N. 1-4 " " " " "

Slaves—Cæsar, York, John, Toney, Bristo, Frederick, Elias, Claibourne, Dick, Bob, Johnny, William, Old Tom, Ned, Albert, Davy, Frank, John, Sy, Lisbon, Ben, George, Wiliam, Primus Elleck, George, Jim, Toney, Horris, Toney, Cuff, York, Dick, Cuba, Amy, Grace, Abram, Rose, Malinda, Francis, Beck, Juba, Fillis, Cloe, Amy, Francis, Susannah, Little Juba, Jane, Margaret, Frank, Mahala, Julia, Louisa, Rachel, Ellen, Matilda, Caroline, Celia, Maria, Nancy, Winney, Monica, Eddy, Kitty, Fillis, Hester, Amy, Israel, Sibby, Scipio and Long Mary.

For four hundred and seventy shares. 470.

(Note—105 Shares transferred to the President of the Union Bank of Florida.)

William G. Ponder, vs. W. D. Moseley and others, Administrators.

16 May, 1838.—W. 1-2 S. W. 1-4 Sec. 1, T. 2, R. 1, N. & W.
South 1-2 " 2, " " "
S. E. 1-4 " 3, " " "
W. 1-2 N. W. 1-4 " " " "
Lot 1 " 4, " " "
Lot 1 and 5, " 9, " " "
N. 1-2 " 10, " " "
S. E. 1-4 sec. 10, " " "
E. 1-2, S. W. 1-4 " " " "
Fractl. sec. 11, " " "
" sec. 14, " " "
" sec. 15, " " "
Lot 1, sec. 21, " " "
Lots 1 & 2, sec. 22, " " "

Slaves—John, William, Edmund, Wilson, Little Wilson, Pitman, Sam, Henry, Rochester, Israel, Daniel, Richard, Tom, Eliza, Polly, Nancy, Matilda, Barbara, Spottswood, Peggy, Mary, Daniel, Penny, Rachel, Emily, George, Phil, Billy, Frederick, Homady, Ned, Jack, Morgan, Anthony, Gully Jack, Tom Harkney, Tom Gonder, Sam, Homady, Primus, Isaac, John, Dolly, Sarah, Hagar, Elizabeth, Fanny, Morgianna, Martha Ann, Mary, Molly, Margaret, Diana, Ellen, Elizabeth, Sam, Sarah, for six hundred and ninety shares. 690.

(Note, 93 shares transferred to the President of the Union Bank of Florida.)

20 May, 1838—S. W. 1-4 sec. 3, T. 2, R. 1, N. & W.
E. 1-2 n. w. 1-4 " " " "
W. 1-2 n. e. 1-4 " " " "
Lot 6, sec. 4. " " "
Lots 2, 3, 6 & 7, sec. 9. " " "
Lot 8, sec. 4. " " "
For one hundred and one shares. 101.

15 May, 1838—Gabriel, William, Squire, George, Isaac, Jac Kealing, Jacob, Moses, York, Albert, Adeline, and child, Mart Ann and two children, Mary and child, Clarissa, Sarah and ch Billy, Mariah and child, Francis Goodwin, Ann and child, Qu and child, Hannah and child, Eliza, Emily, Rachel, Margaret, I ton, Roday, Jane, Kitty, Judy, Patty, Jacob, Jim, Peter, Gab Dick, Daniel, Hackless, Harriett, Walker, Willy, George, N

B. and child, Maria and child, Patsey, Cely, Nancy Burwell, for two hundrd shares, 200

25 January, 1840—Slaves—Sy, Kitty.

For five shares, 5

29 Feb. 1840—W. 1-2 s. e. 1-4 sec. 29, T. 2, R. 3, n. & e.
S. E. 1-2 s. e. 1-4 sec. 30, " " "
S. E. 1-4 n. e. 1-4 " " " "

For eight shares, 8

19 March, 1835,		50 shares.
1 February, 1837 for	60 shares.	
Transfer to Mills,	31	
	—	29 "
7 March, 1838, for	41	
Transfer to Mills,	13	
	—	28 "
16 May, 1838, for	470	
Transfer to Pres't U. B.,	105	
	—	365 "
16 May, 1838,	690	
Transfer to Pres't U. B.,	93	
	—	597 "
20 May, 1838,		101 "
15 May, 1839,		200 "
25 January, 1840,		5 "
29 February, 1840,		8 "
		1383 shar

Union Bank of Florida, 15 July, 1847.

C. G. ENGLISH,
Sol. U. B

And the said plaintiffs here rested their cause.

His counsel then submitted his defence to

chase her. Accordingly the slave went over to Ponder's place, and afterwards Ponder came to the Court House, and after the conversation alluded to by Ponder in his testimony in Camp's case, the negro was bid off by Ponder."

The following testimony of Ponder in Camp's case to be considered as part of the admission, to wit:

"William G. Ponder stated he was present at the sale of the Parkhill slaves under executions of Union Bank and others, in the Spring of 1845. He further stated that Moseley was present at the sale, and advised him (the witness) to purchase. Some suggestions being made as to the title, Moseley said there would be no difficulty—said he had hired the negro, and that it would suit the witness—said he thought there would be no difficulty about the property. Being cross-examined, and in answer to a question from plaintiff's counsel, said the general impression was, that all the difficulty about the property had been done away—it was supposed that the judgment was legal, and had a right to sell the property."

Also called William Bloxham, who, being duly sworn, said he was present at the sale of Parkhill's slaves made by Marshal Camp. Messrs. Manly and Moseley were present. Col. Gamble, President of the Union Bank, was bidding for slaves for Meinetzhagen, and was buying without competition, when Manly asked witness to bid against him. Witness did so, and caused the slaves bought by Col. Gamble to bring about fifteen hundred dollars more than they would have done. Moseley was present directing the sale, and arranging them in lots to be sold; for one slave, Ellen, he bid, and run her up to a large price, stating that she was to be replevied, and to be bought for Mrs. Brockenbrough. To the sale of this slave he objected, but to the sale of none others; he had a book with a list of the slaves in his hand, and stated he was desirous to keep the slaves in the little mortgage from being then sold. Was present at a conversation between Plaintiff, Moseley, and Archer, when the latter observed that he intended to stop the negroes bought at the sale, and which the purchasers intended to send for sale to New Orleans. Witness then took Plaintiff Moseley aside and stated to him that a friend of witness had bought some negroes at the sale and intended to send them for sale to New Orleans, and witness wished to know the intention of Moseley so as to advise his friend. Moseley then said that he would not lend his name to any interference with the sale, that he had felt greatly relieved thereby. When witness

came up to the sale, Mr. Thompson was concluding an address to the people saying that the sale was good and valid.

Cross examined, said he did not hear the sale forbid by Archer.—The place of conversation above alluded to, was in Fisher's tavern The remarks of Moseley above narrated, occurred only between witness and Moseley, and apart from Archer; at that time the slaves alluded to were near town on their way to be embarked; with respect to Manly's suggestion to witness to bid, witness had on his own mere motion bid before, but in bidding against Gamble, witness bid beyond the value under an assurance that Gamble would bid more, and with a view to increase the credit of Parkhill's estate. Ponder was not present at the conversation between Moseley and witness. Does not know whether Ponder was present when Many urged witness to bid. Witness bid off two negroes at the request of a friend, so stating at the time to the Marshal. Knows Juba and Caroline, two of the slaves named in Ponder's bill of sale, but not their present value. Cannot state the value of the hire of the slaves. Juba, for an old woman, was a good hand, and was worth from forty to seventy dollars per year; Caroline about eighty dollars, the price fluctuating and generally low. A female slave of thirteen years would hire for about thirty dollars; a girl of eleven and a boy of ten would be worth about their victuals and clothes. The witness bid for several slaves and all for Dorsey. Thinks the slaves altogether, and those bought by defendant, sold high, and for as much as they would have brought since. Witness has been sued for the negroes bought for Dorsey.

Also called *John G. Gamble*, who being duly sworn deposed—was present at the sale of the slaves by the Marshal in 1845, and took part in it. Moseley, the plaintiff in this suit, stood beside the witness, and took an active part in the sale. Moseley kept memoranda of the sales, divided the slaves into families and lots to have them sold. Moseley professed his entire satisfaction at the sale, stating that he was pleased to have the business closed. Ponder was present and bought at the ale. Moseley urged the bidding. The Marshal counselled during the course of the sale with Moseley, and sold under his instructions. By Moseley's directions the slaves were so divided as to bring the largest price. Thinks Moseley bid for Ellen, and run her up to eight hundred dollars or more, avowing that he bid for Mr. Brockenbrough. Moseley expressed to witness his satisfaction that the sale was made, as he wished to get rid of the concern.

Cross examined, says he did not hear the sale forbid by Mr. Archer. Has heard Ponder say he bought slaves at the advice of Moseley. In the year 1834 the witness borrowed money from Ponder to unable him to go to Europe to negotiate the bonds of the Territory of Florida. This was before the Bank went into operation. Did not then or since explain the nature of the charter of the Union Bank to the defendant.

Also, called *John G. Anderson,* who being duly sworn said, was present at the sale spoken of on the first day, saw the plaintiffs Moseley and Manly present at the sale. Manly kept a list; Moseley also kept a list, and directed the sale. Witness, acting for another person, applied to have a family put up in one lot; the Marshal declined without Moseley's concurrence; Moseley refused, and required the slaves to be put up separately, that they might bring more money, and they were thus sold. Heard Moseley bid more than once at the sale, and take the general direction of the sale.—Heard all that Archer said. He got on a bale of cotton, and stated that the widow's dower had not been allowed, and for that reason, he forbid the sale.

Also called *David D. Young,* who being duly sworn, said, was present at the sale alluded to, heard, on the occasion of one of the slaves being offered, and not being run up, the plaintiff Moseley say, "bid up, bid up gentlemen, the property is not bringing half its price. The title will be good." After that the property sold better. This declaration was made to the crowd around. Many persons were present.

Cross examined, said, the declaration was made in a loud tone to those around, and might be heard at the distance of ten paces.—Heard Mr. Archer say, that so far as he represented the widow, he forbid the sale.

Also called *Edward Houstoun,* who being duly sworn said, he was present at the sale, and saw there the plaintiffs Moseley and Manly. Moseley assisted at the sale in pointing out and stating the qualities of the slaves. Manly had a list also. Did not hear Moseley bid, or advise others to bid. Heard Mr. Archer state that he claimed a title for Mrs. Manly's dower. Heard Mr. Thompson in reply say that the right of dower had been adjudicated and decided against, and that the title was good.

Also called *Medicus A. Long,* who being duly sworn said, was present several times at the sale for short periods, and at the begin-

ning Mr. Archer got up and forbade the sale in the right of the widow and in her behalf; that she claimed dower, and they must purchase subject to her title. He spoke in a loud tone to the crowd.—Moseley was present with a list of the slaves, directing the sale, calling up and naming the slaves, and the order and manner of the sale. Heard the instance stated by Mr. Anderson.

Also called *Otis Fairbanks*, who being duly sworn, said he was present at the sale. A few minutes before the sale, Governor Moseley stood on the steps. As the first slave was put on the stand, Mr. Archer rose and forbid the sale on account and behalf of the widow. Mr. Thompson replied, and asserted the sale was valid. On Archer's forbidding the sale Gov. Moseley by his manner and exclamation, expressed disapprobation, saying the sale had better go on, they could not be sold at a better time. After that heard Moseley say, "bid, bid, I do not wish the negroes to go for nothing." This remark seemed to be induced by the fact that just then some slaves had sold low; after it was made they sold better. Only saw Manly present and keeping a list of the sales.

Also called *Leslie A. Thompson*, who being duly sworn, said, that he was present at the sale. Before any slave was sold, Mr. Archer rose and said that on the part of the widow, he gave notice that the widow had not had her dower assigned, and that all who purchased would do so at their peril subject to the widow's dower. Witness rose to reply, and stated that a claim similar to Mrs. Manly's had been decided against, and that the title was good against her claim. Did not see Governor Moseley until the bidding commenced. Saw Moseley bid for two slaves at least; heard him say to one of the crowd, when a negro was bid off, you have made a bargain; to another he spoke and encouraged him to bid; heard him object to a family being sold entire, and at his suggestion they were sold singly.

Cross examined.—Saw Governor Moseley on the ground before the first slave was bid off. Did not hear Mr. Archer say one word about any other claim than the widow's dower,—nothing about the claim of the administrators *de bonis non*. Witness in his reply did not state anything about the Union Bank of Florida, its mortgages or interest. Did not see Manly do, or hear him say anything. Did not then notice Mr. Ponder. Witness did not before or since this suit hear him say anything about the Union Bank of Florida, mort- &c., &c. Went to the sale on the part of the attorney of

the Bank, and with no purpose of making any statement until he heard Mr. Archer's statement.

Defendant having here rested his cause, the plaintiffs offered to read in evidence a bill filed on the Equity side of the Superior Court of the Middle District of Florida, in which William D. Moseley and his sureties were complainants praying relief, &c., to wit:

To the Honorable Samuel J. Douglas, Judge of the Superior Court of the Middle District of Florida, in and for the county of Leon, in Chancery sitting: The bill of complaint of William D. Moseley, William Doggett, Green Chaires, Henry Doggett, Alexander Moseley, and William P. Moseley, respectfully represents, That complainant William D. Moseley, on or about the 23d April, 1844, was duly qualified administrator *de bonis non* jointly with Martha Ann Manly of the Estate of Samuel Parkhill deceased, left unadministered by the said Martha Ann Manly, late Martha Ann Parkhill, the former administratrix. That said Co-Complainants were and are the sureties on the bond of said administrators *de bonis non*, but were never the securities of said Martha Ann in the original administration, that a large number of slaves, all of about the value of seventy-five thousand dollars, left unadministered by said Martha, came to the possession of said William D. Moseley, administrator *de bonis non* as aforesaid, as will appear by reference to the inventory and appraisements thereof returned by said William D. Moseley to the County Court of Leon county, and signed by him and him alone, a certified copy of which will be produced, if necessary, at the trial of this cause. That on the 4th January, 1845, a judgment was rendered in Leon Superior Court against said administrators *de bonis non*, at the suit of the Union Bank of Florida, for upwards of seventy thousand dollars, to be levied of the goods and chattels, slaves, lands and tenements of said Samuel, deceased, in the hands of said administrators *de bonis non*, that said judgment remains of force against said Moseley, as administrator *de bonis non*, not satisfied or reversed as will appear by reference to the record of the proceedings therein in said court, under the statute of the Territory authorizing the foreclosing of mortgages at common law.—That the judgment aforesaid is the only judgment recovered against said administrators *de bonis non*, and that said William D. Moseley since the rendition of the same, has retained until a few days past, the property of said estate, in said inventory mentioned, to satisfy said judgment in case the same be affirmed in the appeal now pend-

ing in the Court of Appeals. That said complainant Moseley ha hired out the slaves of said estate for the present year to divers per sons for a large sum of money, to wit: Seven thousand dollars, anc upon notes secured to be paid at the end of the year. That since the rendition of said judgment and since the hiring aforesaid, th said Union Bank of Florida, John C. Monford and Kidder M. Moore Executors of William Turner, deceased, William Fisher, Pierpon Philips, Richard T. Birchett, assignee, Ann Davidson, Richard C Saunders, George B. Pease, Charles B. Bioren, Lot Porter, Thoma R. McClintock, have severally obtained judgments, as complainant are informed, in Leon Superior Court, on the law side thereof, fo various and large sums of money against the said Martha Ann Manly and Hiram Manly, her husband, as administrators of Samue Parkhill, deceased, by virtue of the original administration by sai Martha; that said judgment creditors have sued out execution against said Manly and wife, as administrators, *"to be* levied of th goods and chattels, slaves, lands and tenements of the said Samue Parkhill, deceased, in their hands as administrators, to be adminis tered. That these complainants are not parties to said judgments or sureties for said Martha, on her original administration, and ar advised that they are in no wise liable for, or bound to pay said judg ments or executions, and that they are in no wise responsible for an mal-administration, defaults, failures or devastavits of said Hiram and Martha, or either of them, in the management and administra tion of the estate of said Samuel, under the original administration Nevertheless, these complainants expressly aver and now shew unt your Honor that the judgment creditors of Manly and wife abov named, and John G. Camp, Marshal of the said Middle District have proceeded under said executions to levy the same upon the es tate of said Samuel in the hands of complainant William D. Mose ley, as administrator *de bonis non*, retained to satisfy the judgmen against him, and did in fact on Monday the 31st March, 1845, lev the same upon divers of said slaves then in the actual possession o the hirers of said slaves, and that they have advertised the said slave to be sold on the first Monday in May next, to satisfy said judgment and executions against Manly and wife; and these complainant further represent that said William D. Moseley and said other ad ministrators *de bonis non*, have not since the administration by sai Moseley committed any waste or devastavit of the effects of sai estate, but that said William D. Moseley being in possession of sai

estate, was proceeding to administer the same according to law, and to pay the judgment of the 4th January, 1845, recovered against him, if the same should be affirmed.

That unless the judgment creditors of Manly and wife, and the Marshal John G. Camp, Esq., are enjoined and restrained from proceedings so oppressive to said William D. Moseley and his said securities, and unless the said estate is protected in the hands of said William D. Moseley, administrator *de bonis non*, on the faith of which the Judgment of the 4th January, 1845, was rendered, these complainants will be compelled in effect to pay the debts of Manly and wife, for which they are in no wise bound; will be left without any assets to pay the judgment of 4th January, 1845, and will be compelled without waste or devastavit, default, or mal-administration on the part of the administrators *de bonis non*, for whom alone they are sureties, to pay out of their individual means the said judgment of the 4th January, 1845, in case the same is affirmed. All of which actings, doings and pretences, on the part of said judgment creditors, and said John G. Camp, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of these complainants. In tender consideration whereof, and inasmuch as complainants are remediless in the premises, except in equity, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said Union Bank of Florida, Kidder M. Moore and John C. Montford, William Fisher, Pierpont Philips, Richard T. Birchett, Ann Davidson, Richard A. Saunders, Geo. B. Pease, Charles B. Bioren, Lot Porter, and Thomas R. McClintock, may, severally and respectively, under oath, full, true, direct, and perfect answer make, to all and singular the matters above set forth, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and that the said defendants above named and each of them, their and each of their agents and deputies, be perpetuallly enjoined, inhibited, and restrained from levying upon, selling, retaining, taking away, or otherwise interfering with said slaves or either of them, levied upon and advertised for sale, under and by virtue of said executions against said Manly and wife, as administrator and administratrix of the estate of Samuel Parkhill, under the original administration. That said defendants above named, and said John G. Camp, be decreed to re-deliver said slaves levied upon and advertised for sale to the several persons from whose ac-

tual possession they were taken, or to said William D. Moseley, or that such other and further relief be had in the premises, as to this Honorable Court shall seem meet and proper in the premises. May it please your honor, &c.

ARCHER,
Sol. for Complainants.

William D. Moseley being sworn, saith, that the matters of fact contained in the foregoing bill, as far as they are stated from his own knowledge, are true, and as to those matters stated upon information derived from others, he believes to be true.

W. D. MOSELEY.

Sworn to and subscribed before me, this 4th April, A. D., 1845.

SAM'L J. DOUGLAS. *Judge.*

Let the bill be filed—the injunction is denied.

S. J. DOUGLAS, *Judge.*

To the admission of which in evidence the said defendant by his counsel objected, but the court overruled the objection, and allowed the said bill to be read in evidence to the jury, to which decision of the court the defendant by his counsel excepted.

Also called *Francis H. Flagg,* who being duly sworn, said he was present at the beginning of the sale alluded to; heard Mr. Archer's protest. Mr. Archer protested against it as being irregular or illegal, and besides that, the widow had not her dower.

Cross examined, said, does not recollect that he said that while it was irregular or illegal, he used the terms, "besides that" the widow's dower had not been assigned. He did not express any other particular cause of irregularity. Mr. Thompson in reply said, that the question of, or the right of dower in the widow had been decided, and the title was good. Did not go there for the purpose of bidding.

Also called *Justus R. Fortune,* who being duly sworn, said, he was present at the sale; heard either Judge Manly or Mr. Archer make an objection to the sale—he does not know which.—Cannot say whether he went there to bid or not; he did in fact bid off one old negro man, but did not take possession of him; gave him up to Gov. Call.

Also called *John Daffin,* who being duly sworn, said he was present at the sale, and heard Mr. Archer get up and object to the sale and he thinks, but cannot certainly say, that the sale was illegal, as the widow had not her dower assigned her. *Cross exam-*

ined, thinks he heard the word illegal, and that the widow had not her dower.

Also called *James T. Archer*, who being duly sworn, said, witness by a bill had made an application to the court on the morning of the sale for dower for the widow. Did not press it, as the same point had been decided adversely, but wished it filed as notice.—Witness wrote a notice for Manly to make, but Manly hesitated, and then witness rose, (not on a cotton bale,) and in an excited and audible voice declared that the sale was illegal, and that the widow had a claim for dower, and all persons would purchase at their peril. Witness was much excited, and does not profess to state precisely what he did say. Mr. Thompson rose then, and equally excited, declared the sale legal, &c. Witness then went on to explain his understanding as to the effect and illegality of the judgments at and ever since the time they were rendered, and he came to the sale with all those impressions on his mind, and but for the testimony of the defendant's witnesses, this witness would never have doubted that he gave utterance to those sentiments.

Cross examined, admits he was excited and agitated when he made the statement. Since the filing the bill before mentioned, knows of no other action by plaintiff, Moseley, to stop the sale.

Defendant then called Doctor *John G. Gamble, Jr.*, who being duly sworn, said, was present when Mr. Archer got up, was near him. He said in terms that the widow had not released her dower, and persons were notified of the fact, and would purchase at their peril. Mr. Thompson arose, and said in reply, that the question had been settled against the claim of dower, and the title was good.

Both parties here closed their evidence.

And the cause having been fully argued by counsel on both sides, his Honor the Judge instructed the jury as follows, to wit:

1. The judgment and execution under which the slaves were sold are wholly void, and gave no authority, and no right of property passed by the sale.

2. That the judgment and execution being against administrators who had been removed from office, it is the same as if there had been no judgment nor execution.

3. That defendant must be regarded as having purchased with knowledge of the title, is affected with notice of the illegality of the sale, and stands in the position of the Union Bank, the plaintiff, in the sale, and of the administrators who had been removed, getting

their title, and no other. Unless the jury shall be satisfied that th[illegible]e administrators of Parkhill, at the time of the sale, wilfully, deliber[illegible]ately, and of their own free accord and consent, agreed to waive th[illegible]e objections to the sale, and to affirm its validity, and that purchase[illegible]s were mainly made on the faith of such conduct, action or admi[illegible]ssion, and not relying on the legality of the sale, or if the jury ar[illegible]re satisfied that Ponder would have purchased without reference t[illegible] to any statement or conduct of the administrators at the sale, the[illegible]n there is no bar to the recovery of plaintiffs.

4. That if they are of opinion there was fraud on the part of th[illegible]e plaintiff, or a disposition to entrap, or mislead, or deceive purchase[illegible]rs in their action and conduct, they must find for defendant.

5. That if they find that such advice and conduct proceeded fro[illegible]m one administrator, and not from both, that this not to be regarde[illegible]d as conclusive, but that the action of that administrator shall b[illegible] be preferred which is most favorable to the estate.

6. That if they are satisfied that this admission and conduct wer[illegible]e the effect and result of the party's convictions as to the obedienc[illegible] due to the decision of the court after the applications made by th[illegible] party to arrest the judgment, and the sale by the officer, under th[illegible] impression that the court had rightly decided, that such action an[illegible] such conduct will not estop the parties from asserting their rights an[illegible] interests, on discovering that the court was wrong, and the judg[illegible]ment and sale a nullity. That a defendant is bound to respect th[illegible] decision of the constituted authorities, and this obedience, and conduct and action consistent therewith, is not to be taken as th[illegible] free act of the party, to estop him from asserting the truth after[illegible] wards.

7. That if the jury are of opinion that the action and conduct o[illegible] administrators proceeded from a desire not to obstruct or thwart th[illegible] action of the court, or from a disposition to prevent the injury tha[illegible] would arise from a sale of the negroes at a reduced price, in case[illegible] the judgment and execution might turn out to be valid, and with no[illegible] disposition to entrap purchasers then that such action and conduc[illegible] are not wilful, and do not estop plaintiff from recovery.

8. That after the applications to the court by Moseley to arres[illegible] the sale, and in opposition to the judgment and execution, it wa[illegible] not the duty of the administrator, Moseley, to give notice or protes[illegible] at the sale, or to take any part—that, as to the judgment, execu[illegible]tion and sale, he must be considered as having been adjudicate[illegible]

as no representative, or a discredited representative, and his action afterwards must be regarded as that of an individual, and not to affect the estate.

And thereupon the said defendant prayed the Court to instruct the jury in his behalf as follows, to wit:

I. That if the jury believe from the evidence that the slaves sued for went into the possession of the defendant, with the consent of the said plaintiffs, or either of them, express or implied, then that such bailment implies an agreement by defendant to redeliver upon request, and that no action can be maintained, except after demand and refusal by defendant to re-deliver.

II. That there having been no evidence whatever of a demand on defendant before suit brought for the return of this property, the plaintiffs are not entitled to recover.

III. That the plaintiffs in this action being strangers to the judgments on which the executions in evidence issued, and under which the sale by the marshal was made, are not allowed in this action as against this defendant, a purchaser at such sale, to set up that such judgment was and is void, nor to impeach the same collaterally.

IV. That to support the title of a purchaser at marshal's sale as against the defendants in execution, it is enough that he shows a judgment of a court of competent jurisdiction, and that a sale was made by virtue of an execution of the kind the statute prescribes; and to support the title of such purchaser as against the plaintiffs in this action, or strangers to that judgment upon the allegation of title in such plaintiffs, then that a sale of the property by such marshal, in the presence of such alleged owners, without objection on their part, estops the plaintiffs from impeaching the transaction on the ground of their better title.

V. That, if the jury believe from the evidence that William D. Moseley, administrator *de bonis non of* Sam. Parkhill, deceased, one of the plaintiffs, had sole possession of the negroes in controversy before the time when defendant became possessed of them, then that even if the slaves had been wrongfully taken by defendant out of his possession, the said Moseley could bring an action alone and in his individual name for the slaves, and that the said Moseley cannot defeat any defence of defendant against him alone, and in his indivual capacity by joining his co-administrators and suing jointly as administrators.

VI. That if the jury believe from the evidence that the negroes

in controversy were offered at public sale in May, 1845, and that on that occasion the said plaintiffs, or either of them, knowing their title, stood by and did not forbid the sale, and that defendant thereupon purchased the negroes under the supposition that the title was good, then that the party so standing by and being silent will be bound by the sale, and is estopped from asserting the title in himself.

VII. That if the jury believe from the evidence that plaintiffs or either of them stood by and saw the property now sued for, sold to the defendant at public sale, as the property of another under an erroneous opinion of title, without making known their title, then that plaintiffs will not be permitted afterwards to exercise their legal rights against such defendant.

VIII. That if the jury believe from the evidence that the plaintiffs or either of them have made admissions and declarations which are clearly inconsistent with the claims they now propose to set up —that the defendant acted on the admissions and declarations so made, and that defendant will be injured by allowing the truth of such admissions and declarations to be disproved, then that the plaintiffs are estopped from setting up an adverse title.

IX. That if the jury believe from the evidence that William D. Moseley, administrator *de bonis non* of Samuel Parkhill, one of the plaintiffs in this action did heretofore and before the said sale shown in evidence, send one of the slaves in controversy to the defendant, making known to him that said slave was about to be sold recommending him to purchase such slave at the time and place where the sale afterwards took place, that he Moseley would buy the slave but for lack of means, that by reason of such recommendations and suggestions Ponder attended the sale, that at such sale upon suggestion made about the title, Moseley said there would be no difficulty, that at said sale Moseley was present giving a sanction to the sale, aiding in its execution, encouraging bidders, both by declaring values and qualities of slaves, as also by bidding for slaves himself, and that defendant purchased the slaves he bid off on the faith of such acts, understanding that he was getting a good and valid title to the slaves, then the said Moseley is estopped from setting up title in himself against said defendant and plaintiffs cannot recover.

X. That the relations which exist between the Union Bank of Florida and the estate of Parkhill have nothing to do with this suit nor are the bond holders parties to this action, nor do these thing enter into the decisions of the issues in this case.

XI. That if the jury believe from the evidence that before and at the time of the sale shown of the slaves in controversy, said Moseley the plaintiff well knew said sale was to be made under an execution which is now shown to have had no power to touch the property in question, and that yet notwithstanding Moseley allowed the sale to proceed without claiming the property as his own as administrator *de bonis non*, but declared the title proposed to be sold by the Marshal good, and that there would be no difficulty, then that such conduct of said Moseley as administrator *de bonis non*, was and is, as against the defendant a purchaser at said sale an adoption by Moseley administrator *de bonis non*, of that sale as his own, and estops him from setting up that no title passed by said sale. That such alienation is equal in effect to an original conveyance.

XII. That if the jury believe from the evidence that Moseley, one of the plaintiffs, bid for property sold at sale by the Marshal, then that such act was an encouragement to all persons present to bid at said sale, and precludes him from denying its legality.

XIII. That if the jury believe from the evidence that the declarations of Moseley, administrator *de bonis non* of Samuel Parkhill, on the day of the sale were made to the bystanders after the manner of one having authority and control, and directing the sale, then the jury have a right to consider the said sale as made by him in his character of administrator *de bonis non*, and that a good title passed to the purchaser which he cannot gainsay or resist.

XIV. That even if the plaintiffs and defendant are equally innocent, then that the rule is, that if one of two innocent parties is to suffer, he is to suffer whose first action and conduct causes the mischief, and that the purchasers at this sale are not to lose their money and their slaves, if the loss would fall upon them, either by the culpable negligence of Moseley or by his omission to assert an adversary title at a time when he knew the same.

All which said instructions the said court refused to give to the jury, but in reference to the tenth prayer for instruction, instructed and charged the jury:—

That the property in question could not be sold under execution by the Union Bank of Florida, except as a Trustee for the Bondholder, and that Ponder is not a purchaser without notice: That until the expiration of the time limited to the mortgage, the Bank cannot sell the slaves under a judgment at law for a debt of its own.

To all of which said several rulings, decisions and judgments of the said court during the trial of this cause, to the instructions given in to the jury and to the refusal of the said court to instruct the jury as prayed by defendant, the said defendant excepts and forasmuch as the said matters excepted to do not appear upon the records of said court, tenders this his bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record.

Hagner, for Appellant:

1st. What must a purchaser at sale of Marshal show to protect his title?

1st. *In against defendant in execution.*

It is enough that he shows a judgment of a court of competent jurisdiction, and that a sale was made by virtue of an execution of the kind the statute prescribes.

1 Blackford's Rep. 210. 1 Hill's S. C. Rep. 239. 3 Scammon 110. 4 Scammon, 370. 3 Wash. C. C. Rep. 546. 1 Overton 236. 3 Cranch, 300. 1 Monroe's Rep., 94. 6 Har. & John., 182 11 Gill. & John., 217. 2 Bibb's Rep. 202. 2 Bibb's Rep. 518 6 Gill & John., 298. 8 Missouri, 257. Though reversal of the judgment the defendant shall not have restitution of the goods.

5 Coke, 99—12 Eliz. 8 Coke, 24. Cro. Eliz. 278. Cro. Jac., 246 1 M. & S., 425.

But the value of them for which they sold.

The aforementioned cases, and 2 Saunders 101. 1 Taunton, 359 6 Cowen, 297. 1 Washington Rep., 116. 2 Munford, 272, and 4. 3 Bacon's Abridgement, Title Error, p. 390. 6 Peters, S. C. Rep 8. 10 Peter's S. C. Rep., 475. 1 Harris & John., 405.

2d. *As against a stranger*, who claims title, we insist that a sale of the property by such Marshal, in the presence of such alleged owners, without objection on their part, *estops* from impeaching the transaction, on the ground of better title.

As to estoppels and laws of the same:—

Co. Littleton, 352 a.

Regarded with favor by courts at this day:—

2 Smith's Lead. Cases, 459, 460, 467. 3 Hill's N. Y. Rep. 220.

And this favor is extended to them *on principle, and as a rule of policy.*

Same authority last cited, 219, Cowen J. 2 Starkie on Evidence, p. 28. 1 McLean Rep. 183, 388, 390. 1 Story's Equity Jurisprudence, 387—note 4. 5 Ham. Ohio Rep. 124.

Acts of estoppel. 1st. Standing by and giving a sort of sanction to the sale.

6 Adol. & Ellis, 474.

In that case Lord Denham uses this language:

"But the rule of law is clear, that, when one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in thia case might have parted with his interest in the property, by verbal gift or sale, without any of the formalities, which throw technical obstacles in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury, &c., ought to have been taken, whether he had not, in point of fact, ceased to be the owner."

And the same Judge, in the case of Gregg *vs.* Wells, 10 Adolph. & Ellis, 90, says:

"Picard *vs.* Sears was in my mind at the time of the trial, and the principle in that case may be stated *even more broadly,* than it is there laid down. A party who *negligently* or *culpably stands by,* and allows another to contract, on the faith and understanding *of a fact which he can contradict,* cannot afterwards *dispute that fact,* in the action against the person whom he has himself assisted in deceiving."

To the same effect are the following cases:

2 Devereux's Rep., 179. 9 Cowen, 275. 19 Wendell, 563.—1 Fonblanque's Equity, ch. 3, sec. 9, p. 163.

2d. They were silent when they ought to have spoken, and will not be allowed to speak now.

Robert's on Frauds, p. 130. 2 Vernon's Rep., 151. 1 Story's Equity Jurisprudence, sec. 385, p. 387. 2 Vernon, 370. 16 Maine, 146. 10 Adol. & Ellis, 437. 21 Maine, 137. 7 Watts, 163.—5 Call Rep., 463.

3d. The active agency and participation in the sale by the plaintiffs in this action:

6 Adol. & Ellis, 475. 9 Barn. & Cress., 577. 3 Barn. & Adolph., 313. 10 Adolph. & Ellis, 90. 1 Barn. & Adol., p. 142. 9 Cowen, 275. 4 Metcalf, 381. 21 Maine, 130. 2 Murphey's Rep., 6. 3 Hill's Rep., 215.

In same case, Bronson, J., dissenting upon his view of the facts, declares the law of estoppel by admissions.

1st. The admissions must be clearly inconsistent with the evidence proposed, or title to be set up.

1d. That the other party acted on that admission.

2d. Injury, if allowed now to disprove. And the judge lays down as the sum and substance of the whole "The facts and admissions operate against him in the nature of estoppel, when *in good conscience* and *honest dealing*, he ought not to be permitted to gainsay them."

We are content with this exposition of the law.

On the same head:—

7 H. & J., 337. 1 H. & McH., 146. 8 Yerger, 388. 4 Munford, 129. 4 Paige, C. Rep., 94.

Under 3d head, of active agency and participation in my brief advert to record and facts:

It is shown—1st. That the plaintiffs were not only not forbidding the sale, but taking the active *charge, management and control.*

2d. When bidding was chilled by the effect of Archer's announcement, Moseley said "bid—I don't want the negroes sacrificed—I will be glad when they are off my hands." After this, says the witness, the negroes sold better.

3d. The statement by Moseley to the parties, on their objections to title, by assurance "that all was well," was of itself an open declaration of the strongest kind—an admission calculated to remove any impression, if such had before existed, that the sale would be disputed.

4th. Manly's act in encouraging the sale, by having Bloxham act as a bye-bidder, is a gross fraud, if this sale can now be set aside.

5th. The declarations by Moseley that the titles were good encouraging bidders, addressed to the by-standers, was calculated to hav[illegible] proved to have had distinct effect, on the general sales [illegible] entitled to the benefit of such decl[illegible]

deed the mere standing by and giving a sort of sanction by that act alone to the proceedings, is declared by Lord Denman to be an act of such a nature, from which the jury can infer that the plaintiffs had ceased to be owners—how much more potent is Moseley's bidding for the property?—does it not utterly repel the idea of then existing title in himself? The bystanders were entitled to put faith in his conduct—and doing so, men were deceived and induced to alter their previous position, to part with their money, and instead become owners of these negroes—and now great mischief and injustice would be caused by permitting the plaintiffs to withdraw from the position they then assumed.

6th. These slaves were knocked off to the purchasers, in the presence of Moseley and Manly, before they had paid their money. Had they spoken out then, and claimed title, these defendants might have refused to complete the purchase. They were silent when they ought to have spoken, they will not be allowed to speak now. But they were cognizant of the transaction, and did nothing to prevent it.

II. Are the plaintiffs in this action *strangers*, or were they parties or privies *to the former judgment of the Bank?*.

The plaintiffs, however, would fain anticipate such an inquiry, and insist that that judgment was and is *absolutely void*. Now, was that judgment void and a mere nullity?

First, It was the judgment of a court of *competent jurisdiction*—the parties sued were yet before the court—the subject-matter was also within the jurisdiction—the parties plead in bar of the action.

5 Cranch, 185. 6 Peters, 16-17. 3 Cranch, 306. 2 Peters, 163. 10 Wheaton, 192. 10 Peters, 468.

Second, The judgment was reversed *mainly* because two pleas remained open, undecided. The Supreme Court plainly regarded the judgment as *erroneous* merely.

1 Florida Reports, 110, and this was the correct view. Viner's Abridgement, (Judgment G. A.,) contains the following strong case:

If *praecipe quod reddat* is brought against my father, who dies pending the suit, and I enter as heir, and after judgment is given against my Father, and the Defendant enters, I shall not have assize, for the judgment *against a dead person* is not void, but error, *quod nota.*

Thus, then, if the old administrators had been "actually," instead

of "civiliter" *mortui*, their death would only have rendered the judgment erroneous, or voidable, and not void.

If not a void judgment, but conclusive until reversed, on *parties and privies*, then the question recurs, are these plaintiffs STRANGERS TO THAT JUDGMENT?

Manly *ex ux.* were parties to the suit—duly served with process as *administrators*. They plead *in bar* amongst other pleas, *their discharge*—it is replied to, and on demurrer to rejoinder, judgment was given for plaintiff.

When plea pleaded, *Manly and wife were administrators de bonis non*. This was shown in the pleadings, and is as well as if in proof. Judgment against them, therefore, was good, until reversed. 1 Levintz, 261. 2 Levintz, 190. 1 Lord Ray., 63. Comberbach, 220. Lord Raymond, 265.

Two of these plaintiffs then were parties—the third privy in estate. 1 Flor. Rep., 110. Cro. Car., 167. 8 Cowen Rep., 34—43

The property seized and sold was the property of the estate.

III. But be the judgment in favor of the Bank void, an utter nullity, to which these plaintiffs were neither parties nor privies, how do they stand in relation to the judgments and executions against Manly and wife, administrators of Parkhill, deceased.

These judgments are unreversed and are irreversable—and being so cannot be declared a nullity by any authority of law. 10 Peters, 473.

The sales were made under these executions and judgments as well as that of the Union Bank.

We have thus established, we believe, that the purchasers at show enough to bar a recovery; they show valid judgments, competent jurisdiction, and that sales were made the statute prescribes.

he instructions prayed by defendant below should have been given.
he 1st and 2d instructions asked require reference to authorities
are satisfied they can be upheld. The counts here are two.—
on special bailment—*the other* on supposed finding. The se-
count can only be sustained upon proof of possession obtained
igfully without pretence of bailment. 4 Bos. and Puller, 145.
i the case at bar, the possession was with the consent of the
itiffs, either express or implied. The proof, then, being of
nent, recovery must be on the *first* count, or not at all. 4 Bos. &
, 351. Buller's N. P., p. 139. 1 Chitty's Plead., 141.
i actions of detinue, *the detainer* is the gist of the action, and
i general principles, where there is no certain debt or obligation
but a mere collateral engagement or duty, the plaintiff must
a foundation for his action in a special demand. 1 Saunders,
i. 6 Comyn's Digest, Tit. Plead., c. 69, 73, pp. 84 & 85. 5
n Rep., 409. Buller's N. P., 151. 1 Chitty's Plead., 362-3.
es on Assumpsit, pages 232, 236, 288, 241.
i the case of Bemers *vs.* Howard's Ex'rs, Taylor's Rep., 149,
[redell's Dig., 146,) it is said, "on a promise to deliver goods, a
and before action is indispensably necessary." 5 Hill, 37.
lso p. 143 to same point. Story on Bailment, p. 82. sec. 107.
:ite also—24 Wendell. 203. 6 B. & C., 464.
ie plaintiff must have a right to the immediate possession of
thing detained—if returnable on demand, he has no such right
l demand refused. Archbold N. P., 287, 290, 292, 295. 2
ter's Commen., p. 81. 2 Mumford's Rep., 122. 2 Stephens N.
). 1313. 2 Selwyn's N. P., 543.
ie 3d and 4th instructions have been already presented in ar-
ent.
i the 5th we recur to evidence of sole possession of Moseley in
record, the inventories and appraisement, and the bill of com-
it of Moseley.
full right of action was in Moseley alone, (1 Williams on
s 653, note c. and authorities,) and we insist he cannot defeat any
ice by joining co-plaintiffs in this suit.
e this attempted in 5th instruction of judge, and his refusal to
t all those instructions looking to Moseley's sole action.
[, VII, and VIII require no further illustration.
ider the 9th instruction arises a view of the case we think perfect-
tal to recovery of plaintiffs.

William G. Ponder, vs. W. D. Moseley and others, Administrators.

Was there not a valid sale of the negroes made by William D. Moseley, administrator *de bonis non?*. He had full power over the estate. 1 Monroe, 96. Ram. on Assets, 608, N. E., and authorities. 4 D. & E., 632. 2 Vesey, 267. 1 Atkyn's, 463. 2 Bingham, 177. 1 Will. on Ex'rs, (670, N. E.) 1 Lomax on Ex'rs 344. 1 McCord's Rep. 492. 1 Wendell's Rep., 583.

Only exception is where there is collusion between the purchaser, or mortgagee, and the personal representative.

2 Williams on Ex'rs 672, (N. E.) co-executors regarded as one person. 2 Williams Executors, 683, (N. E.)

Antiquated distinction between administrators and executors in respect of their full authority, done away. 1 Wendell's Rep., 583.

The 11th and 12th instructions present same points of view with that last considered.

The 10th would seem a self evident proposition, yet the very converse has been assumed by the court below.

The 14th instruction was properly applicable, and ought to have been given. Had it *alone* been given, plaintiffs never could, *as they never ought,* to have recovered.

Archer, for Appellee:

The introduction of the record, containing the order of dismissal of Mrs. Manly as administratrix, was pertinent to the issues, because it contained evidence to show that the judgment *subsequent* to the revocation was void, and that the sale was consequently also void.

The mortgages executed by Parkhill to the Union Bank, when he became a stockholder, to secure his subscription, were also properly received in evidence, as they embraced the slaves in question, and were of record in Leon. So long as these mortgages were outstanding, the property was not subject to sale under execution at law.

The bill praying an injunction on behalf of Moseley and his securities, was properly received in explanation of Moseley's conduct at the sale. It showed that he had exhausted his remedies before the Superior Court, before the supposed acquiescence was given—and that he did not, except as a necessity, yield his claims to the property.

The 1st and 2d instructions given by the court were correct, as upon the facts exhibited by the record the judgment and execution were void, and as a consequence no title passed to the purchaser. Griffith *vs.* Fraser. 3 Pet. Cond. S. C. Rep. 1.

The other instructions mostly depend upon the doctrine of estoppel *in pais*. The rule governing estoppels of this character, as given by Lord Denman, and adopted by our Supreme Court, in Cotten *vs.* Williams, 1 Fla. Rep., 54, is this:—"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the later a different state of things as existing at the same time." The following requisites, therefore, are necessary to constitute an estoppel of this character: 1. The subject-matter of the belief induced must be a state of *things—facts*, and not opinions.—Polk's lessee *vs.* Robertson, 1 Tenn., 463. Craig *vs.* Baker, Hardin Rep. 281.

2. The party to be estopped must not only cause the other to believe in a state of *facts*, but he must *wilfully* do it. That is to say, he himself must not be deceived—there must be imposition.—Moore *vs.* Hitchcock, 4 Wend., 292. Ibid., 480. 5 Pick., 452. 2 Conn., 467. 10 Alab., 278, citing 2 Baily, 581.

3. The party claiming the estoppel must have acted upon the statements of the other party, and altered his position. He must not be informed of the facts from any source—he must have been deceived, and must have acted upon the deception differently from the action he would have taken had he not been deceived.

4. The party to be estopped must be seeking to establish a different state of facts as existing at the same time. That is to say he must be seeking to contradict himself as to *facts*, which the law will not permit him to do. He must be seeking to recover upon his own falsity.

It requires a combination of all these requisites to make up an estoppel of this kind—and if the facts of this case show a failure of either, the appellees are not estopped. A reference to the facts without any comment on them, will be sufficient to convince us that not one of these requisites can exist in this case.

The instructions given by the court, when tested by these principles, will be found scarcely to give the appellees the full benefit of the doctrine of estoppel, as applicable to the facts of this case.

William G. Ponder, vs. W. D. Moseley and others, Administrators.

As to the first and 2d instructions *refused*, there was a wrongful and tortuous taking of these slaves by the officer—and where this is the case no previous demand is necessary to maintain detinue.

As to the 3d and 4th instructions *refused*, the court did not err, if we are correct in the position that the judgment is void, by reason of being rendered after the dismissal of Mrs. Manly, and while her successors in office represented the intestate. See Griffith *vs.* Fraser, above cited. Taylor *vs.* Savage, 17 Peters, 224. 1 Fla. Rep., 130.

The execution commanded the officer to make the sum recovered of the goods and chattels, &c., of S. Parkhill in the hands of the original administratrix. This writ was executed by a levy on the goods, &c., of S. Parkhill in the hands of the administrators *de bonis non*. If this can be legally done, as a consequence the securities of the last administrators would be liable to the *devastavits* of the first—this "never could be right." 2 Call, 41, 56.

Brockenbrough, for same:

As to sales under void judgment and execution, see case cited by Mr. Hagner. Armstrong vs. Jackson, 1 Blackford, 211.

A judgment must be produced. Den *vs.* Wright, et al., 1 Peters C. C., 67. Campbell et al., *vs.* Browne and wife, 6 Howard (Miss.) 112. Ventris et al. *vs.* Smith, 10 Peters, 173-4-5-6.

Bona fide purchasers for valuable consideration without notice, acquire no title where the party selling has no right to sell. And this may be either by revocation of letters, or non-compliance with statute.

No one but executor or administrator can sell. Hence if he who is not executor or administrator sells, it is non-compliance with statute. So revocation is in fact a non-compliance with statute. See Thomp. Dig., 202, sec. 2, as to sales, &c. Denning *vs.* Corwin, 11 Wend. 652. Hollingsworth *vs.* Barbour, et al., 4 Peters, 470.

Record must shew jurisdiction of the *party* by *notice* or *publication*, where publication is lawful. Also 3 J. J. Marshal, 105. 1 Florida, 127.

But here the execution was invalid on its *face*. Woodcock *vs.* Bennett, 1 Cowen, 739.

The levy was bad because it did not follow the execution. Moseley's appointment and inventories shewed the property not in hands of Manly and wife as administrators.

Bad because levied upon property *mortgaged,* and mortgages recorded. Bad because the property is mortgaged, and mortgages are a security for ultimate payment of Terriotrial bonds. Bad because the property by the charter, is to remain in possession of mortgagor until forfeiture, and the charter is notice. It is a public act.

As to the question of estoppel in *pais,* Lord Denman's Rule, 6 A & E., 475, in Pickard *vs.* Sears, adopted by this court in Cotten *vs.* Williams, 1 Florida, 54, is in these words: "The rule of law is clear, that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things existing at the same time."

In Gregg *vs.* Wells, 10 Adolph. & Ellis, 90, [37 Eng. C. Law,] Lord Denman says that rule may be laid down more broadly, thus: "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has *himself* assisted in deceiving. The defence here is in substance *collusion* between Denham and the plaintiff."

1st. In examining this rule the first question is this, can 'one' estop a whole 'party' by his words or conduct in which they do not participate—can one estop several?

2d. Can a man, acting in his own right, estop himself acting in *another right,* or *vice versa,* must not both acts or pieces of conduct be in the same right or capacity.

3d. If he can estop several—and if by his individual acts he can estop himself in *auter droit.* Still can he by himself estop by his individual contract, the acts of himself and *others in auter droit.*

Fraud, imposition, deception, are the ground works of all estoppels *in pais.*

If one man can estop several, a fraud may be worked by the doctrine upon innocent parties for the benefit of a stranger or purchaser, a volunteer, which would be wholly inadmissible; *caveat emptor* should apply. The *fraud* is more palpable, and the law aginst the stranger more palpable when *he knows* there are several in interest, and only sets up the words or conduct of one.

Fraud is the essence of estoppel *in pais,* and where it would work fraud it is never permitted. 2 Smith's Leading Cases, Am. ed., 467.

To make the admission of one, even *receivable* against several there must be *not a mere community of interest*, but a joint interest 1 Greenleaf Ev., 209, sec. 176, and cases cited. And the first case cited, shows executor's interest to be *a community* and not *joint* For admission (says he) of one executor cannot be received to take a case out of the statute of limitations aginst his co-executor, citing Tullock *vs* Dunn, R. & M., 416, and Hammon *vs.* Huntley, 4 Cowen, 495, in which case an acknowledgment in writing by 2 or 3 executors was held inadmissible, because it might involve the other in a *devastavit.*

So the admission of receipt of money by one trustee will not bind the rest. Davies *vs.* Ridge and others, 3 Espinassee, 101-2. Lord Eldon puts it on the ground that they are *trustees* and says if individually liable, they would be bound.

So in Doe *vs.* Brown, 4 Cowen, 492. The admission of one tenant in common in the same suit, is not admissible aginst his co-tenants and co-plaintiffs. The court says: "But it would seem an unjust rule which would suffer one tenant in common, to admit away the rights of others. As far as I have been able to discover an admission by a party to the record is evidence aginst him who makes it, and where there are partners aginst them also, but not against others who happen to be joined as parties to the suit. The cases which speak of the admission as proper evidence, will be found to have reference to a sole *plaintiff* or *defendant.*" Such an admission was not held in that case ground enough to admit, "secondary evidence of contents of a will."

2. As to parties acting in *auter droit;* the very examples cited under first head to show that *one* cannot estop *several,* are still stronger to show that he cannot do so in *auter droit.* The case in Espinasse of co-trustees is put on that sole ground. And in the executors case in R. and M., and Hammon *vs.* Huntley in Cowen, it is put on the ground of their being executors, and that one might force others to be guilty of a devastavit—that is, might be made by the rule, to be guilty of fraud on the others. But see further, 1 Greenleaf, 211 and 179. "Admission of a *guardian* or *executor* or *administrator* before completely clothed with the trust, or of a porchier amy, before commencement of suit, cannot be received either against ward or infant in the one case, or *against himself* as the representative of heirs, devisees and creditors on the other, though it may *bind the person himself*, when he is afterwards a party *suo jure* in another

action." Why? Clearly because the administration cannot be *qua executor, &c.* Cannot be in *auter droit*—and so if made as an individual after investiture with those powers, it could not bind him, and *a fortiori* not bind others in *auter droit,* for the same reason, and *ubi eadem ratio est ibi idem lex.* See also 4 Perry and Davidson Rep. 1 to 9, Fox *vs.* Waters. Admissions by one co-executor not made *qua* executor not binding on his co-executor. 2. Executors interests not *joint.* 3. Opinion of admission of a matter *of law* as the legal effect of a deed, could not bind a co-executor even in a case where it might in a matter of assets. (In our case it was supposed judgment instead of a deed.)

3. If I have sustained either of the two first propositions in the negative, then a negative must follow upon this. But having established both—that one cannot estop several, unless their interest is entirely *joint* (as partners) and that one acting in his own right cannot estop himself in *auter droit* (especially against one knowing the capacities in which he acts.) it follows *a fortiori* that one acting individually cannot estop several in *auter droit.* If anybody was deceived, it was by him as an individual, for which he must have an action for *deceit* if he can show *fraud* and *damages* sustained by it.

A party acting *bona fide* may bind estates, &c. But can an executor impress his *fraud* upon the *property of the estate?* He may bind *himself* by fraudulent representations, but can he thereby create a *devastavit* and affect *his sureties,* his co-executors, the widow, distributees and creditors? His sureties cannot be affected by his *mis-pleading* though matter of record. Thomp. Dig. 211, S., 4 and S. 5. He is charged as of his own estate, with a *devastavit,* if he cannot prove that he has duly administered *according* to law, if assets have come to his hands.

And see Thomp. Dig. 358, S. 6. When a sale is made of lands or slaves by execution, a deed or bill of sale shall be made, and if more money is made than the execption demands, it shall be paid to the *defendant* without delay.

The defendants in execption not being the administrators in this case, the property would be given away.

Supose that Mosely had designed and perpetrated a *fraud* on Ponder, that fraud would be his own act. He cannot commit fraud *qua* administrator. He cannot give opinions on titles *qua* administrator. His powers are only to administer according to law. These

do not extend to letting property go to purchase at a void sale, on a judgment *vs.* nobody, by giving an opinion that the title was good, or "that there would, he thought, be no difficulty." The most rational supposition is that he was himself deceived, as well he might be, by the perseverance of the court—the zeal of the Marshal—the energy of the executioners—the eminent authority and positiveness of all counsel except his own, and the greedy avidity of purchasers —and the universal *opinion* of the crowd, (as Ponder testifies.)

If I have laid down the law correctly—parties could not be *deceived,* because they were bound to know that law, and they had no right to act upon any such declarations. They would be estopped by the law from saying they acted upon such declarations, for they would be bound to know that they could have no effect. Coles, &c., Executors, *vs.* Bank of England, 37 Eng. C. L., 134. An *executor* who had committed forgery not estopped by that, but by gross negligence of testator. And in Davis *vs.* Bank of England, misprison of Felony in *concealing* forgery by which his own stock was sold, did not estop him from recovering the stock. 9 Eng. C. L., 452. See 1 Stra., 20.

But to return to Lord Denman's rules, the 2d question under them. "By his words or conduct *wilfully* causes another to believe in a certain state of things, and induces him to act on that belief." Or in Gregg *vs.* Wells. "Who negligently or culpably stands by and allows another to contract on the faith and understanding *of a fact* which he can contradict."

The gist of this is plaintly, *deceit, fraud.* It must be wilfully or negligently or culpably, and it must be *in a fact,* and the party must not act on his own independent knowledge. He must be induced to believe the fact. He must not believe it before or be induced by others to believe it. It must be a case where *his contradiction* of the fact, would at once induce the party not to act.

A promise, an agreement, a covenant, (though that might in some cases to avoid circuity estop the party by deed,) will not estop the party *in pais.*

1. The party must believe *the fact* and *act upon it;* upon this ground rests: The Pres. Con. of Salem *vs.* Will., 9 Wend., 148.

The party must act on the belief. Wallace *vs.* Truesdale, 6 Pick., 457. A party averred property to be that of a 3d person, to prevent a sale, but the sale went on. He was not estopped from suing for it. Welland Canal Co. *vs.* Hathaway, 8 Wendall, 486.

2. When the party stating *the fact* is himself mistaken, then there is no fraud—the "wilful"—"culpable" and "negligent" are wanting, he is not estopped. Thus in Nichols *vs.* Arnold, 8 Pick., 174, a party was not estopped by declaring he was not a *creditor* of an insolvent firm, and declining to become a party to their deed of assignment under the supposition that a sale made to them in his behalf by auctioneers had been *guaranteed* when in fact it had not. On the same ground that the *parties have participated* in a common *mistake.* A party was not estopped from claiming from his co-surety his half of money recovered from the principal, though he had *testified* as a witness in behalf of his co-surety *vs.* the principal, and thus enabled him to recover the whole debt as his own. Doolittle *vs.* Dwight and another, Administrators. 2 Metcalf, 556.

3. It must be the enunciation of *fact* and not of *opinion of law.* Thus in Kimberly *vs.* Ely, 6 Pick., 451. Even accepting a dividend under a void insolvent law of Mass. did not preclude the party from recovering all the remainder of his debt in New York, though the insolvent law purported to give absolute discharge.—See opinion of Lord Denman himself in Fox *vs.* Waters, 4 Perry, 2 Davidson, 7, cited.

Polk's lessee, *vs.* Robertson, 1 Term. 463. So opinion as to the legal effect of a contract (here it is a judgment.) Bost. Hat Man. Co. vs. Massenger, 2 Pick., 223. "But the testimony was immaterial; since the confession of a party as to the legal effect of his contract cannot bind him, it surely ought not to bind others, who may be joined with him."

So Craig *vs.* Baker, Harden's Reps., 281-3-4-9. A party was consulted as to a title, and pronounced it "as good as any on the north side of Licking," yet was not estopped from setting up his own which was better, after the party consulting him had bought under that opinion.

So admission under a mis-apprehension of his legal rights do not estop. More *vs.* Hitchock, 4 Wendell, 292, 293.

The party must contract on the faith and understanding *of the fact,* —he must be induced to act on that belief. Ponder does not pretend to this. He does not say it, when he might have said it, and it was his interest to say so, *if true.* He does not say he acted on Moseley's advice or in consequence of his declarations. But says "it was supposed that the *judgment* was *legal* and had a right to sell the property."

The *general opinion* was that all difficulty about the property had been done away.

It is clear from this and *the bill of sale* he took, whose title he thought he was buying (Camps) not Moseley's nor Mrs. Manly's.—There was no question of fact, it was all of law, whose title was the best, or in his own words had the judgment a right to sell the property? Moseley's opinion could not affect the question, and it seems did not affect the *conduct of the party*. Unless that could be clearly shown, as Ponder might have done by his own testimony, it would be most absurd to say a party should be estopped by conduct or words which had *no effect*. The burden of proof is on Ponder to show that it affected him. Admissions have no effect unless they would produce some injury to the other party if permitted to be denied. See cases cited, 11 Hill & Cowen, notes, and Philips, 210. Estoppel of *receipter* is limited by this *test of injury*. It does not extend without the period or beyond the limits in which it would do injury to refuse the estoppel. Thus after delivery, receipter is not estopped, Johnson *vs.* Church, 12 Pick., 307. So it does not extend beyond the extent of the injury which might be effected by withholding it.—Thus though he cannot set up properly in himself to defeat the receipt, he can do it in mitigation of damages, because by delivery he would have a right to bring trespass. Burley *vs.* Hamilton, 15 Pick., 42.

5. It is not necessary to give a party notice or information of that of which he is already advised. Woodcock *vs.* Bennet, 1 Cowen, 734.

"Process bad on its face," does not always mean that the irregularity appears in the writ—it may exist in a fact *aliunde*, as the party being dead, or "tested out of term." 1 Cowen, 739.

A party who purchases under a void judgment, knowing it to be such, is not a *bona fide purchaser* in the legal sense, and he need have no notice. Jackson *vs.* Caldwell, 1 Cowen, 644. Woodcock *vs.* Bennet, 1 Cowen, 734. Wood *vs.* Calvin, 2 Hill, 567-8.

"The general rule is, that a purchaser, under a power, buys at his peril, and, however innocent, cannot acquire a title without showing a valid subsisting power."

"Lawrence was not a *bona fide* purchaser. He had full notice that the judgment had been paid, and the debtor was not in fault in omitting to tell him, what he very well knew already."

"Knowledge that another party had a claim, is enough to put

the party on enquiry." He might have learned all about it by ordinary diligence. 1 Coven, 642, Jackson *vs.* Caldwell. That interference at a sale does not amount to a consent to it. See Hearn *vs.* Rogers, 9 Barn. & Cres., 577. 17 C. Law, 452. Willoughby *vs.* Backhouse, 9 Com. Law, 821. 8 B. & C., 821. 9 Eng. C. L., 252.

Lord Coke also lays down certain "rules to make the reader more capable of the learning of estoppels." 3 Thomas' Coke, 467.

1st. Every estoppel ought to be reciprocal, that is to bind both parties.

If Moseley and Manly and wife, administrators *de bonis non,* were sued by Ponder in that capacity, for a debt *vs.* Parkhill's estate would he be estopped by this loose talk from saying *he did not buy of the administrators de bonis non,* but of Camp, and showing his bill of sale? See Welland Canal Com. *vs.* Hathaway, 8 Wend., 486.

A party dealing with a foreign Corporation by its name, is not estopped from denying its existence, and requiring strict proof and the best proof, because there is no reciprocity in such an estoppel.

2d. Every estoppel, because it concludeth a party to allege the truth, must be *certain* to every intent, and not to be taken by *argument* or *interference.*

Apply this test, there is no certainty. It is all argument, and only interference. And what is to be inferred? Even that is doubtful. It may be that Moseley thought Camp's title good, or that he would not sue. It is difficult to find what is to be inferred. There is no *allegation.*

Thirdly. Every estoppel ought to be a *precise affirmation of that* which maketh the estoppel, and not be spoken impersonally, as if it be said, *'ut dicitur, quia, etc., impersonalitas non concludit, nec legat; impersonalitas dicitur, quia sine, persona.'* Here the words are, "There would be no difficulty. He thought there would be no difficulty." Entirely impersonal, *sine persona.* It binds nobody—there is no affirmation.

Sixthly. 'Estoppel aginst estoppel doth put the matter at large.' Ponder having taken Camp's *title,* paid him the money—taken slaves from him, and taken his title, as by law directed, in valid executions, is estopped from claiming the title of administrator *de bonis non.* If Moseley's loose conduct could estop him and Manly, how much more should these grave acts estop Ponder? 2 Murphy 6, Cross *vs.* Terlington. 2 Camp., 441, Holmes *vs.* Lipscombe.

Ellenborough was about to non suit a surgeon, who sued for fe[illegible]s because he had been called "Doctor," and signed prescriptio[illegible]s "M. D.," because a physician cannot sue for fees in England; b[illegible]t when he found defendant had paid £3 13*s.* 6*d.* into court, h[illegible]e thought that remitted the objection, and admited his right to sue a[illegible] *surgeon.*

Eightly. Where the verity is apparent in the same record, ther[illegible] the adverse party shall not be estopped to take advantage of th[illegible] truth; for he cannot be estopped to allege the truth, when the trut[illegible] appearth of record.

Thompson, for Appellant:

We contend—

I. That the judgment of the Union Bank of Florida against Martha Ann Manly and Hiram Manly, administrators of S. Parkhill deceased, and through which the plaintiff in error claims title, was not void, but erroneous merely.

It must be admitted that the late Superior Court of the District of Middle Florida had jurisdiction over the subject-matter of the suit, which was brought to recover a sum of money due on a single bill made and executed by the said Parkhill in his life time. See Act of Congress of May 15, 1826, Sec. 1. Thompson's Digest, 597—Appendix.

The power to hear and determine a cause is jurisdiction; it is *coram judice,* whenever a cause is presented which brings this power into action. If the plaintiff states such a case, that, on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction. United States *vs.* Arredondo, 6 Peter's Rep., 709.

Tested by this rule, it cannot be doubted, that of the *subject-matter* of the suit, the Superior Court rightfully entertained jurisdiction.

But it is contended that every court must have jurisdiction over the person of the defendant, and that, without notice, actual or constructive, one can no more be deprived of his property than he can of life, limb, or liberty; and that the Superior Court had no jurisdiction over the person of the defendant, and, therefore, could acquire none over the subject-matter of the suit.

We admit that a judgment is inoperative and null, as against the

person who has not had notice, either actual or constructive; but we shall contend and maintain that the defendants had notice of the institution of the suit, and submitted their persons to the jurisdiction of the court.

The suit in the Superior Court was instituted by summons *ad respondendum,* which was duly served, and the defendants apepared.

The order of pleading which the law has prescribed and settled and which the defendant is to pursue, is laid down, as follows:

1st. To the jurisdiction of the court.
2d. To the disability of the person.
1st. Of the plaintiff.
2d. Of the defendant.
3d. To the Court or Declaration.
4th. To the writ.
1st. To the form of the writ.
1st. Matter apparent on the face of it.
2d. Matter *dehors.*
2d. To the action of the writ.
5th. To the action itself is bar thereof.

This, it is said, is the natural order of pleading, because ea subsequent plea admits that there is no foundation for the former, precludes the defendant from afterwards aviling himself of the n ter, as when the defendant pleads to the person of the plaintiff admits the jurisdiction of the court—for it would be nugator plead that defence in a court which has no jurisdiction; and the defendant pleads to the count, he admits that the plaintiff is to sue him, and the defendant to be sued; and when the defe pleads to the form of the writ, he admits the form of the court after a *plea in bar* to the action, the defendant cannot ple *abatement,* unless for new matter arising after the commen of the suit. 1 Chitty's Pleading, 474.

The want of jurisdiction did not appear on the face of t cedings, nor was any pleaded; but the defendants, after imparlance, pleaded in bar of the action two pleas, viz: *factum* and *plene administravit,* on which issue was joined. fore, we say it was not a void judgment. See Thompson *vs* 2 Peter's Rep., 163.

All the cases cited by the defendants in error of void j want of jurisdiction of the person, are of the follo

I. Where there has been no service of process, or any constructive notice upon the person sought to be charged by such judgment —as in Campbell *et al. vs.* Brown, 6 Howard Miss. Rep., 111— which was a case where the defendants had never been summoned, either actually or constructively.

Denning *vs.* Corwin, 11 Wend. R., 651—a partition suit, in which there was no service of process, personally or by publication.

Hollingsworth *vs.* Barbour, 4 Peters R., 472, was a proceeding against "unknown heirs," and an attempt to give notive by publication—the court decided the record was no evidence that any such heirs existed, and the decree and deed made in pursuance of it could not avail to pass any title, without evidence that there were some heirs.

3. J. J. Marshal, 105—no service of process, nor any evidence of publication, in a chancery suit; or

2. Where courts of a special and limited jurisdiction have exceeded their powers in assuming control over persons not subject to their jurisdiction.

As in Smith & Shaw, 12 Johnson's R., 257—the case of a court martial assuming jurisdiction over one not in the military service of the United States, held to be a nulity.

Thurston *vs.* Martin, 5 Mason R., 498—where the assessors taxed one without their territorial jurisdiction, held to be an excess of jurisdiction and trespass maintainable against the collector, who imprisoned the plaintiff.

Perkin *vs.* Proctor, 2 Wilson R., 382—where commissioners of bankruptcy assumed jurisdiction over one who was not a trader.

Griffith *vs.* Frazier, 3 Peter's Cond. S. C. Rep., 1—where a Court of Ordinary in South Carolina assumed jurisdiction to appoint an administrator, because of the absence of the executor who had proved the will—which was held to be a void grant.

There is, we believe and contend, no room for doubt, but that the Superior Court of the Middle District of Florida had jurisdiction, as well of the persons of the defendants, as of the subject-matter of the suit, or action, at the time of the institution of the suit, and the filing he pleas in bar, &c. &c.

Now, when was the jurisdiction *ousted;* or, rather, can a court [illegible] rightfully and properly obtained jurisdiction of a suit, both [illegible] matter be *ousted* by any matter, super-

"since the comencement of the suit," or "since the last continuance?" It must be answered in the negative.

However, no mater of *jurisdiction* was pleaded, *"puis darrein continuance;"* but it is urged that the fact of the revocation of the letter of administration of Mrs. Manly, set up in the plea *puis darrein*, showed that she was *civiliter mortua.*

Mrs. Manly and her husband, however, still appear in Court by attorney, pleading the fact of revocation *in bar* of the action—the plaintiff continued prosecuting—both parties were fairly before the Court, and the question was upon the effect, or conclusions of law, upon the matter pleaded. The Court decided the question:—this Court has declared erroneously, and the error has been corrected by the reversal of the judgment.

No usurpation of power, no unwarrantable assumption of jurisdiction, appears in the proceedings of the Superior Court.

In Elliot *vs.* Pierson the Supreme Court decides, that "when a Court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, its judgment until reversed is regarded as binding in every other court." 1 Peter's Rep., 340.

But it is said Mrs. Manly was *civiliter mortua,* by the revocation of the grant of administration, and the judgment afterwards was a nullity. No greater effect can be given by the law to a *civil death* than to a *natural death;* and a judgment against a dead man is not void, but erroneous. Viner's Abridgement, Tit. Judgment, G. a.

And so, if after the commencement of a suit, a party plaintiff or defendant dies, before verdict or interlocutory judgment, it is an error of *fact,* which is corrected in the same court by a writ of error, *coram nobis.* 2 Tidd's Practice, 1136.

But it is clear, from an examination of the case of the Union Bank and Parkhill's administrators, 1 Florida Rep., 110, *et seq.;* that the judgment of the Superior Court was reversed for errors of law in the record, and was not declared to be a void judgment.

I may here invite the attention of the court to the case of Voorhees *vs.* Bank U. States, in which the Supreme Court of the United States go very far to support a judgment founded on constructive notice of the suit. 10 Peters, 471, 472.

And to the case of Ranahan *vs.* O'Neal, in which the Court of Appeals of Maryland fully sustain the position of the previous case cited. 6 Gill & Johns., 298.

Fraud, too, which strikes at the root of every contract and agreement does not affect judgments. Ch. J. Marshal, in delivering the opinion of the Supreme Court in Sims & Wise *vs.* Slocum, said, 'the judgments of a Court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void, and therefore all acts performed under them are valid so far as respects third persons.' 'All the legal cosnequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud as if it had been obtained fairly.' 3 Cranch Rep., 300.

Courts will not declare a judgment void, unless there is a total want of jurisdiction. The policy of the law requires that some sanctity should be given to judicial proceedings—some protection afforded to those who purchase at sales by judicial process, and some definite rules established by which property thus acquired may become transmissible with security to the possessors. 10 Peters, 473. 8 Missouri Rep., 257. 6 Gill & Johns. Rep., 298.

II. It is also argued by the counsel for the defendants in error, that the execution issued on the judgment is also void because it is irregular *on its face.*

The matter of irregularity, it is argued, need not be stated in the writ to make it irregular on its face, as if, according to the practice in England and in New York, where the execution is required to be tested of some day in term, if it be tested out of term it is irregular on its face; so if it issue against one who is dead, it is irregular on its face, although the death of the defendant be not stated in it, and cited. Woodcock *vs.* Bennet, 1 Cowen Rep., 734-'39.

On examination of the facts of this case, it will be found that it was a case of a judgment against two persons; one died—a year and a day elapsed after judgment before execution was sued out. It was then sued out without *scire facias.* The writ was held not void but voidable—it issued correctly against both defendants to correspond with the judgment, but could be levied only on the goods and chattels of the survivor: it was good against the survivor till set aside on his application.

At p. 738, there is a dictum of the court that an execution against one who is dead is *void,* because the dead cannot appear in court to move to set it aside for the irregularity: but the learned judge here referred to the case where the defendant was *ipso facto* dead, not to the case of a legal or constructive death. In the case at bar, the counsel for the defendants in error do not contend for

any other than a constructive death, and the reason does not apply; the parties being alive could have appeared and moved to quash or set aside the execution, as effectually as they subsequently appeared in this court to prosecute their writ of error to reverse the judgment.

The case of the administrators of Parkhill and the Union Bank, in 1 Florida Rep., 110, *et seq.*, was also referred to in connection with this point, but I do not understand this court in that judgment to go farther than to decide that the judgment should be reversed for error. If, however, the counsel for defendants in error be correct in their position that Manly and wife were *similiter mortui*, as administrators, from the time of the revocation of the letters of administration, and had "no day in court," how could this court recognize them as plaintiffs in error in their suit in error here for the reversal of the judgment of the Supreme Court.

III. Having shewn that the judgment of the Superior Court in favor of the Union Bank of Florida against Parkhill's administrators was not void, though erroneous; then we contend that the other judgments and executions under which, as well as that of the Union Bank, the sale was made are not void; the execution having been issued on the same day, and on judgments rendered at the same term of the court, and on the same pleadings as the case of the Union Bank. See Record p. 19. These judgments are now irreversible from limitation of time. See the case of Voorhees *vs.* Bank United States, 10 Peters, 473, *et seq.*

IV. Again, it is urged by defendant in error, there is an irregularity in the *levy* of the writ of execution: the judgment is against Manly and wife as *administrators*—not administrators *de bonis non.* The command of the writ is to levy on the goods, &c., of S. Parkhill, in the hands of Manly and wife, administrators, and the Marshal has levied on the goods, &c., of S. Parkhill in the hands of Manly and wife, administrators *de bonis non*, and this is a patent irregularity.

We answer to this, that they represented the same right, they were the same persons claiming and having the same rights by another title. If one is sued as *executor* when he is *administrator*, and does not plead in abatement, he cannot set it up in bar of the plaintiff's action, because it is the same right and but by another name.—Granwell *vs.* Sibley, 2 Levintz, 190. Harding *vs.* Salkin, Comberbach, 220. Same case, Skinner, 365. Powers *vs.* Cook, 1 Lord Raymond, 63-4.

So if judgment is rendered against one as *administrator* who is *executor* with another, and a second suit is brought against both in their character as exectuors, the former judgment against one of them as administrator may be pleaded in bar of the second suit, because there was a true debt due, and a recovery had upon the right of the debt. Parker *vs.* Amys, et al., 1 Levintz, 261.

The judgment being against a proper person by the wrong name does not vitiate it—the law looks to the right, and it is the same.—Therefore, a judgment and execution against A *executor* of B, when he is *administrator* of B, may be levied on the goods, &c., of B in the hands of A, administrator, to be administered, and thus it is shewn there is no irregularity, patent or otherwise.

The case of Griffith *vs.* Frazier, 3 Peters Cond. S. C. Rep., 1, was cited by the defendants' counsel to support their position: but it will be seen, on examination, to be wholly inapplicable. That was a case where an executor had proved the will of his testator, and had obtained letters testamentary thereon in the proper jurisdiction in South Carolina, having removed from the State, the Ordinary afterwards granted administration *durantee absentia* to another. A *scire facias* on a judgment recovered against the testator in his life time was sued out against the administrator *durante absentia,* and execution obtained, levied on the lands of the testator, and a sale thereunder. It was held by the Supreme Court that letters *durante obsentia* could not legally issue after probate and grant of letters testamentary, and that therefore the administrator was not the representative of the deceased, but that *another person* was the representative who was the executor.

In the case at bar, the persons are the same who hold the right of represenation; they are called by the wrong title, but there is no question of their identity.

V. But the counsel for defendants in error assert there is another iregularity. The judgment and execution was against the goods, &c., of S. Parkhill, in the hands of Manly and wife, adminstrators, &c., and it was levied of the goods, &c., in the hands of Manly and wife and Mosely, administrators.

If an action at law be brought aginst one of two or more executors or administrators, unless the non-joinder of the others be pleaded in abatement, the plaintiff will be entitled to his judgment against the one sued for debt, and if he proves assets in the hands of the defendant and his co-executors or co-administrators, he will be entitled

to his judgment that the debt be levied and made of those assets.—This cannot be denied.

This, then, is a sufficient answer to this alleged patent irregularity. The law will not give a plaintiff a judgment which cannot be enforced.

Again, if suit be brought against several co-executors or co-adminstrators, and upon the isue of *plene administravit*, assets be found in the hands of one only, the plaintiff can take judgment only against him whom he proves to have assets; if then, it would be irregular to levy on those assets in the hands of another of the executors, or in the joint possession of two or more it would always be in the power of several co-executors or administrators to defeat the action of judgment creditors by shifting the assets from one to another, as the circumstances of their case might require.

The slaves so levied on by the Marshal were in possesson of Manly and wife as well as Moseley, and were of the goods of Samuel Parkhill, deceased, the debtor of the plaintiff. This possession is asserted in the declaration filed in the present suit by the defendants in error, and cannot be avoided or denied.

I have thus, I think, met and answered satisfactorily all the positions of the counsel for the defendants in error, so fas as the validity of the judgments and subsequent proceedings thereon are concerned, singly and in the order presented and urged upon the court; if I am not mistaken in the conclusion I have arrived at, that not one alone is tenable, it certainly follows that they derive no additional force taken together.

If, then, the judgments of the Superior Court were erroneous, and not void, and the execution, the process prescribed by law, it follows that the authorities referred to by my colleague, Mr. Hagner, that the judgment and execution are good and valid until reversed, and that all proceedings had thereon are good—that is, the officer is protected in executing the writ, and the purchaser is protected in the possession and enjoyment of the property acquired at the sale under said process. Upon reversal of an erroneous judgment, which has been executed, the defendant is entitled to restitution of the money only.

Question of Estoppel.—I come now to this question, in which we say, that even if we are mistaken in our view of the validity of our title under the judgments and executions, yet these parties are *estopped* by their acts, declarations and conduct from setting up a title adversary to us.

For a full view of the law upon this point, I need only refer to the very able argument of my colleague, Mr. Hagner, a brief of which is in the possession of the court. With this general reference to the authorities it will be sufficient for me here to asert, that from the decision of Lord Denman in Pickard *vs.* Sears, 33 Eng. Com. Law R. 115, 117, of the same Judge, in Gregg *vs.* Wells, in 37 Eng. Com. Law R., 54, and the Supreme Court of New York in Dezell *vs.* Odell, 3 Hill's Rep., 217, as well as the other authorities, it seems clear that the law of *estoppel in pais* may be laid down thus:

1. Words or conduct causing another to believe the existence of a certain state of things.
2. In which the person speaking or acting did so wilfully, culpably or negligently.
3. By which such other person may be induced to act so as to change his own previous position.

Under the first head, let us refer to the evidence in the record to ascertain what were the words, and what the conduct of Moseley in reference to the subpect matter of dispute.

1. He sent a slave to Ponder to tell him to purchase her assigning his own inability as a reason for not making the purchase himself.
2. At the sale he encouraged Ponder to buy, saying there would be no difficulty about the property, thus giving confirmation as to the verity of general impressions, and removing all trace of doubt in relation thereto.
3. His active participation in the sale by the Marshal, arranging the slaves into lots and parcels—insisting on the division of families in order to secure a better price, recomending the slaves and speaking of their good qualities.
4. Encouraging others to bid; and,
5. Offering the highest evidence of the sincerity of his acts and declarations, and his belief therein, by bidding for himself and his friend and counsel, W. H. Brockenbrough, Esq.

These are among the most prominent of his acts and conduct, and who is there who can say that these acts and declarations, &c., did not induce the belief in all who saw and heard, that, by the sale, a full, complete, and valid title would pass, free from all objection on the part of Moseley? Could any one suppose that Moseley did not believe in such a state of things?—and was it possible for a person there attending and purchasing to believe, or even to think

that from Moseley he must expect a harrassing and vexatious litigation, for the very property which he (Moseley) was urging them to buy? Clearly not. Moseley, therefore, did, by his acts and conduct, induce a "belief of the existence of a certain state of things," which the law of "good words" will now interfere and estop him to deny.

Under the second head, we ask, was not this conduct wilful, culpable or negligent, for either is sufficient? To answer this, it is sufficient to look at the testimony, and see if he did not then know as much in relation to the property as he did afterwards, and now.

Can it be pretended he did not then know that he was one of the administrators *de bonis non* of S. Parkhill—that the property was taken from the possession of Mr. Manly and wife and himself, by the Marshal, on an execution in favor of the Union Bank of Florida, against Mr. and Mrs. Manly, as administrators of said estate, as well as other executions, in favor of other plaintiff?—and did he not know the proceeds of the sale would be applied to the satisfaction of the executions? Did he not know the state of pleadings under which said judgments were obtained? What does he now allege?—that the judgment execution, levy and sale, are void, and no right or title passed thereby to the purchaser. Are his acts, conduct, or declaration at the sale, consistent with the claims now set up?

Knowing all the facts and circumstances, and his present claims of right and title, he was bound to declare them to those strangers whom he saw about to purchase. *Silence* under such a state of things would be inexcusable—*a multo fortiori*—the active participation in the sale, and his encouragement to the persons present to bid for and purchase the property. His encouragement of, and advice to Ponder, to purchase, was personal and direct—and can it be said his acts, &c., were not wilful and culpable?

Lastly. Can it be denied that Ponder's position is changed?—has he not parted with his money?

Is it possible to asert, upon the evidence in this record, that Ponder parted with his money on any other ground than for the purchase of property, to which his title would be good? We say, without the fear of contradication, that if the title be bought proves defective, he looses his money, the consideration paid for it—has no claim for indemnity upon the officer, none upon the plaintiff in execution

Ch. Rep., 563, the party was estopped by his admission that the notes in that case were good, valid and binding notes—the court holding he was bound to make them so; and the plea which he set up that he was himself deceived, was not allowed to have any force. See also 1 Story's Equity, 202-3.

It is also argued that loose expressions will not amount to any estoppel, and the following cases are cited: Jordan *vs.* Antrey, 10 Ala. Rep., 278. Tuffs & Hays, 5 N. Hamp., 452. Jackson *vs.* Anderson, 5 Wend., 480.

While we freely admit that loose and general expressions not made to the party, and not calculated to induce him to believe in a state of things, so as to produce a change of his previous position, will not amount to an estoppel, yet we contend such is not the case at bar. The authorities cited shew that loose and general expressions upon which the party could not have acted do not amount to estoppels, and are not applicable.

It is also urged by the counsel for the defendant in error that one of several cannot estop those interested with him, unless there is a joint interest; that a community of interest is sufficient—and cities Greenleaf on Ev., 209-211.

We admit the position but deny its application here; if these parties were tenants in common, then the act of one would not bind the others, because they hold by unity of possession, not of property; but co-executors and co-administrators have a *joint* interest, and the act of one in selling or disposing of the estate in their hands, &c., is the act of all—the property passes, for they have a joint and entire interest. See this subject fully discussed in 1 Williams on Executors, p. 591, of the Phil. edition of 1832. Bacon's Abr. tit. Executors, (D) 1.

It is said that the admission of one co-executor will not take a case out of the statute of limitatons; this is not stated broad enough—the admission of *all* cannot have that effect. Thomp. *vs.* Peter, 12 Wheaton Rep., 565.

The true doctrine is that one of several co-executors or administrators or trustees cannot by his admission charge the others *personally* as for a *devastavit*: and it is this which is intended, when it is said one trustee, executor, &c., cannot bind his colleagues. See Nation *vs.* Tozer, 1 Crompton, Meson & R., 172.

The case of Fox *vs.* Walter, cited from 4 Perry and D. 9, has no application, for it is manifest from the evidence that Moseley did act

qua administrator: he was not, in the eloquent description of the learned counsel, a discredited representative, impotent to act. His suggestions and directions as to the sale of the property so as to produce the most money were implicitly obeyed, even against the dictates of feeling and common humanity in the separation of families. This shows that he assumed to act as one having a deep interest: no stranger would have so acted, or been permitted to make requisitions upon the officer so repugnant to feeling, they were yielded to, no doubt, because they were supposed to be prompted by a stern sense of duty.

In Cross *vs.* Terlington, 2 Murphy Rep., 8, one was held bound as administrator by his acts before his appointment.

Another objection is urged against the estoppel, because it is said Moseley as administrator had not power to dispose of the estate of his intestate by any other means than a public sale; nor could he sell the slave till all the other estate was disposed of, and only to pay debts; and cited Thompson's Digest, 202.

The answer to this is, that the statute is *directory* merely—it points out how the executor, &c., may perform his duty—it contains no negative words—it does not declare the sale made otherwise to be null and void. It does not conflict with the common law, as to the power of executors or administrators, but points out his duty.—If he departs from the instructions given, his acts are not invalid; but if injury results, he is liable as for a *devastavit*.

The case of Ventris *vs.* Smith, in 10 Peters, R., 173, cited by the counsel for defendants in error, was decided on the local law of Alabama, which differs from our statute, and from the common law.—In Alabama, the slaves may not be sold without an order of court—the statute is negative and peremptory, and if not followed, no title passes.

The excuse set up for Moseley, that he yielded to superior force alone, is not sustained by the record—he did not speak or act like one coerced into measures. It is said he had exhausted all his lawful remedies, and nothing was left him but to oppose by force of arms, which he would not attempt.

An error—his legal remedy was not exhausted, if it is true that he was a stranger to the proceedings, he could have interposed his claim under the statute, by tendering his affidavit and bond. The injunction applied for may have been refused on the ground that if he had any remedy, it was complete at law upon his own showing.

The only point remaining to be disposed of is, that the property in question has been mortgaged by the intestate Samuel Parkhill in his life time, and, therefore, was not liable to seizure and sale, under an execution at law.

It will be seen from the record that the slaves were mortgaged to the Union Bank, the plaintiffs in one of the executions under which they were sold, to secure the subscriptions of Samuel Parkhill to the capital stock of said Bank; and that the obligation on which the judgment and execution of the Bank was for a loan made under the 29th section of the charter of the Bank, on a pledge of the stock.

The Court of Appeals of the Florida Territory decided in the case of Kissam *et al., vs.* Chapman *et al.,* that the Band had a lien on the property mortgaged for the loan, on the pledge of stock, under the 29th section of the charter, as well as for the subscriptions to the capital by the stockholder, which gives the right to the Bank to pursue the property for this very debt.

Whether the Bank does or does not perform its duty to the Territory, in the application of the funds to the extinguishment of the Territorial bonds, is not for these parties to inquire. If the Bank does not faithfully perform its trust, it is for the Territory, or the holder of the Territorial bonds, to complain. The Bank, as mortgagee, is the legal owner: and these parties—that is, the representatives of Parkhill's estate—cannot deny the right or title of a purchaser of property, under an execution in which they are defendants.

If the Bank has taken its own property, or the property of a third party, a stranger, to pay a debt of their intestate, it does not lie on the mouths of these mortgagors to complain of it.

LANCASTER, J., delivered the following opinion:

This case comes before this court by appeal from Leon Circuit Court. It is an action of detinue brought by the administrators *de bonis non* on the estate of Samuel Parkhill, deceased, to recover from the defendant, William G. Ponder, certain negro slaves alleged to belong to the plaintiffs as such administrators, and to be detained by the defendant, Ponder. The declaration contains two counts. The first declares upon a delivery of the slaves to the defendants by the plaintiffs, to be re-delivered to them, when he, the defendant,

should be thereto requested. The second count declares, upon a casual loss of the slaves by the plainitffs, and that said slaves afterwards came to the possession of the defendant, Ponder, by finding; and that he, well knowing the said slaves to be the property of the plaintiffs as administrators, &c., aforesaid, although often requested so to do, hath not delivered them to said plaintiffs, as administrators, &c., as aforesaid, and still detains the same.

To this declaration, the defendant pleaded—1st. *Non detinet.* 2d. That said slaves sued for, or any of them, were not the property of the plaintiffs, as in their declaration alleged. 3d. That the plaintiffs were not lawfully possessed of the negro slaves mentioned in the second count in their declaration. Upon all of which pleas, issues were joined. Upon the trial of this cause, the plaintiffs among other things offered in evidence the revocation of letters of administration to Martha Ann Manly, late Martha Ann Parkhill, on the estate of Samuel Parkhill, deceased; to the introduction whereof the defendant by his counsel objected—which objection was overruled by the court, the testimony admitted, and thereupon the defendant by his counsel excepted. The plaintiffs also offered in evidence sundry mortgages executed by Samuel Parkhill in his life time to the Union Bank of Florida, (nine in number,) to secure his shares of stock in said bank, with a view of proving that the slaves in suit were embraced in said mortgage, &c., &c. To the introduction of which evidence the defendant by his counsel objected, but the court overruled the objection, and allowed the testimony to be given in evidence before the jury—to which ruling the defendant by his counsel excepted; also, a bill in Chancery of W. D. Moseley, one of the plaintiffs in this suit, praying an injunction, &c., to restrain the sale of the negroes belonging to the estate of S. Parkhill, deceased—which injunction was denied by the Judge of the Superior Court, to whom it was presented to be allowed. To the admission of which in evidence the defendant by his counsel objected, but the court overruled the objection, and allowed said bill to be read in evidence to the jury—to which decision of the court, the defendant by his counsel excepted. The proof on both sides having been given in evidence, and the cause fully argued by counsel on behalf of each of the parties, the court gave to the jury eight several instructions. And the counsel for defendant moved the court to give sundry instructions, numbered from one to fourteen, inclusive—all of which were refused by the court to be

given, but instead of the tenth instruction asked by the defendant, gave an additional instruction—all of which said instructions given or refused by the court are specifically set forth in the record. To all which said several rulings, decisions, and judgments of the court, on the trial of this cause, and to the instructions given and the instructions refused to be given to the jury, the defendant excepted, and prayed his exceptions might be signed, sealed, and enrolled, and made part of the record of this case, which was done.

The plaintiffs proved that their intestate, S. Parkhill, deceased, died seized and possesed of the slaves for which this suit was brought, which continued to be the property of his estate, up to the time of the seizure by the Marshal of the Middle District of Florida, of which mention will be hereafter made. It further appeared in evidence, introduced by the plaintiffs, that, on the 20th of March, 1845, the said Marshal levied on the slaves in this suit depending, as well as other slaves belonging to the estate of S. Parkhill, deceased, by virtue of an execution, or writ of *fieri facias*, issued from the Clerk's Office of the Leon Superior Court, wherein the Union Bank of Florida was plaintiff, and Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife said Martha Ann, administrators of Samuel Parkhill, deceased, were defendants; which said execution was issued by virtue of a judgment rendered in the Superior Court for Leon county aforesaid, wherein the said Union Bank of Florida was plaintiff, and the administrators were defendants, and which judgment was in favor of the plaintiff. It further appeared, that by virtue of said levy by the Marshal under the execution aforesaid, and after having duly advertised the same, the said Marshal, on the first Monday in May, 1845, proceeded to sell the said slaves in this suit depending at public sale, to the highest bidder for ready money—at which said sale the said defendant, William G. Ponder, became the highest bidder, and bought and paid for the said negroes. Upon which title, supported by an alleged estoppel *in paris*, the defendant placed his defence.

The plaintiffs contend that the aforesaid judgment of the Superior Court, rendered in favor of the Union Bank of Florida aginst the said Martha Ann Manly late Parkhill, and Hiram Manly in right of his wife said Martha Ann, administrator of Samuel Parkhill deceased, as well also as the execution of writ of *fieri facias* issued thereon, and upon which execution or writ of *fieri facias*, the levy and sale of the negroes was had, which said negroes are the subjects of con-

troversy in this suit, were and are null and void. And further that there are or were no acts or things done by the said plaintiffs which can or ought to amount to an *estoppel in pais,* so as to conclude them from having and maintaining this suit.

Upon these positions of the parties, the first instruction given by the court, is in the following words, to wit:

1. The judgment and execution under which the slaves were sold are wholly void, and gave no authority, and no right of the property passed by the sale.

This instruction was excepted to by the defendant and it now devolves on this court to decide upon its propriety.

Whether a judgment be absolutely or wholly void depends upon the jurisdiction of the court in which it is rendered; this again is divided into jurisdiction of the subject matter of the suit, and of the person of the defendant.

The suit in which the judgment referred to was obtained, was instituted in the Supreme Court of the Middle District of the Territory of Florida, held in and for the county of Leon in said Territory, upon a bond executed by Samuel Parkhill in his life time, to or in favor of the Union Bank of Florida. The Superior Court was organized and jurisdiction conferred upon it by virtue of saundry acts of Congress. The act approved May 15, 1826, entitled "An Act to amend the several acts for the establishment of Terriorial Government in Florida," contains in the first section thereof the following provisions: "That the Superior Courts of the Territory of Florida within their respective districts shall have and exercise original jurisdiction in all civil cases in law or in equity, whether arsing under the laws of the said Territory, or otherwise, where the sum in controversy shall amount to one hundred dollars, and shall have original and exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, whether such seizures be made on land or water, and all suits for penalties or for feiture incurred under the laws of the United States, and original but not exclusive jurisdiction of all suits in which the United States shall be a party, whatever may be the amount in controversy in such causes and suits, and shall have and exercise appellate jurisdiction in all civil causes originating in the inferior courts of said Territory, whatever may be the amount in controversy; and shall have and exercise original and exclusive jurisdiction of all crimes

and offences committed against the laws of said Territory, where the punishment shall be death; and original and appellate jurisdiction of all other crimes and offences committed against the laws of the said Territory; and original and exclusive jurisdiction of all crimes and offences which shall be cognizable under the authority of the United States, committed within the respective districts of the said Superior Courts, or upon the high seas."

The second section of the same act gave power to the Superior Courts in term, and the judges thereof in vacation, to issue writs of *habeas corpus*, of error, of *certiorari*, of *mandamus*, of prohibiton, of *scire facias*, and of *quo warranto*, according to the principals and rules of law. See Thompson's Dig., 597.

It may, perhaps, be safely assumed, that no court in the United States, or in any State in the Union, either now or in time past, is or was invested by law with a more general original jurisdiction than was by the act of Congress in the sections before recited and referred to, given to that court. It was emphatically a court of general jurisdiction, and by the first clause of the first section recited above, had jurisdiction of the subject matter of the suit between the Union Bank of Florida and the administrators of Samuel Parkhill, deceased.

But to perfect the jurisdiction of a court of general jurisdiction, it is necessary to have jurisdiction of the person of the defendant in the action. That is to say, he must have actual or constructive notice of the institution of the suit by which an opportunity is or may be afforded him of making defence, if he should desire so to do. In the case of the Union Bank of Florida against Parkhill's administrators, the suit was commenced by summons *ad respondendum*, against said administrators, the mode directed by the laws of Florida for instituting suits in the Courts of the Territory. See Duval's Compilation, p. 90, Sec. 4. The process was regularly returned by the Marshal duly executed, and the defendants, the said administrators of the said Samuel Parkhill, deceased, apepared in court, and pleaded to the action, the pleas of *non est factum* and *plene administravit*. These pleas were pleas in bar. It is laid down in Bacon's Abridgement. Title Pleas and Pleading, letter (A.) "that the order of pleading is 1. To the jurisdiction of the court. 2. To the person of the plaintiff, and next of the defndant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the

action itself in bar thereof." The author then adds "this has been settled as the most natural order of pleading, because by this order each subsequent plea admits the former; as where the defendant pleads to the person of the plaintiff he admits the jurisdiction of the court, for it would be nugatory to plead anything in that court that has no jurisdiction in the case." When therefore he pleads in bar of the action he admits the action of the writ—the writ—the count—the parties—and the jurisdiction of the court.—The pleas in that action were pleas in bar of the action, and therefore according to the order of pleading before mentioned (which order is substantially recognized by all the legal writers who have treated on the subject of pleading at common law) all the antecedent steps were admitted by the defendants to have been lgally or aptly taken. But the defendants having appeared in court and pleaded to the action thereby admitted legal notice of the institution of the suit as well also as the jurisdiction of the court, not only of the parties to the action, but also of the subject matter of the suit. On the two pleas in bar before mentioned issues were joined by the plaintiff. At that time the jurisdiction of the court in that cause, not only existed in contemplation of law, but by the steps taken, had acquired a practical application of the parties to the action. Subsequently the defendants pleaded *puris darrien continuance*, a revocation of their letters of administration on the estate of Samuel Parkhill, deceased, to which plea the plaintiff demurred. Demurrer was sustained. Defendants then amended their plea *puis darrien continuance*, the plaintiff filed a replication. The defendants rejoined, and plaintiff demurred, which demurrer was sustained and judgment as aforesaid given for the plaintiff. Upon which judgment execution as aforesaid issued, went into the hands of the Marshal, was levied and negroes sold in the manner herein before stated. After the sale a writ of error was sued out, by the defendants against the plaintiff returnable to the Supreme Court of the State of Florida, upon the hearing whereof it was decided by the said court that "errors were well assigned" and "the judgment was reversed." See Parkhill's Administrators *vs.* Union Bank of Florida. 1 Flo. R., 110 to 133.

The defendant in this case (the appellant in this Court,) claims title to the negroes in controversy, under and by virtue of a purchase made by him at a public sale of the Marshal of the Middle District of Florida, who levied, advertised regularly, and so sold,

under and by virtue of an execution issued from the Clerk's office of the Superior Court in and for Leon County, upon a judgment rendered by said Superior Court, at a time when said judgment was unreversed and in full force. But which judgment was afterwards reversed by the Supreme Court of the State of Florida, not because the Superior Court had not jurisdiction in the case, both of the subject-matter and of the parties, but because of errors apparent in the proceedings in the court below. Many instances were cited in argument, which showed the courts had considered and declared judgments void for want of jurisdiction of the person of the defendant. As where the defendant had never been summoned actually or constructively. Campbell, et al., *vs.* Brown, 6 How. Miss. R., 111. No service of process personally or by publication. Denning *vs.* Corwin, 11 Wend. Rep., 651. An atempt at service by publication against "unknown heirs,"—not evidence of the existence of *heirs,* and decree and deed in pursuance thereof, could not pass title without such evidence. Hollingsworth *vs.* Barbour, 4 Peter's Rep., 472.

So also in cases where courts of special or limited jurisdiction, have exceeded their powers by atempting to assume where they have not jurisdiction over the person. Thus a Court Martial assumes jurisdiction where the party was not liable to Martial law, held void. Smith *vs.* Shaw, 12 John. R., 157.

In a case of assessment of taxes, if the person taxed or the subject-matter of taxation, be not within the authority of the officers who make the assessment, all subsequent proceedings by mere ministerial officers under a warrant to enforce the tax are deemed utterly void, the original assessment being *coram non judice.* Thurston *vs.* Martin, 5 Mason R., 501. See also cases there cited.

Upon a commission of bankruptcy sued out against a person not a *trader,* (a class of persons over whom, under certain circumstances commission may issue) it was held the commission of bankruptcy was void, the jurisdiction being confirmed to particular persons and cases. And the court said, "Where courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice.*" 2 Wilson R., 384. An application was made for letters of administration during the absence of the executor who had duly proved the will of the testator, and qualified as executor thereto, which was granted by the Court of Ordinary in the State of South Carolina. This case going by writ of error to the Su-

preme Court of the U. S., the court say, (Chief Justice Marshal delivering the opinion) "In its very nature the appointment of an administrator, during the absence of an executor under no disability is essentially nothing more than the appointment of an agent for that executor. This the ordinary has no power to do. The executor alone can appoint his agents. If the ordinary had *no jurisdiction* in the case, then the grant of administration is void *ab initio*, and all the acts of the grantee are void." Griffith *vs.* Frazier, 3 Peter's Con. R. S. C., 11-12.

These cases and many others not deemed necessary to be referred to, shew that to authorize the assertion, that a judgment is void, it must have emanated from a court of limited jurisdiction, not acting within its legitimate prerogative, or in a court of general jurisdiction where the parties are not actually, or by legal construction before the court and subject to its jurisdiction.

The case referred to in the instructions under consideration was before a court of general jurisdiction. The parties were before the court. Pleas in bar o fthe action and *puis darrien continuance* were filed. Upon the whole case judgment was given by the court for the plaintiff which was subsequently reversed for error. Was this judgment void or voidable?

It is laid down in Elliot, *et al., vs.* Piersol, *et al.*, 1 Peter's R., 340, and re-asserted in 2 Peters, 169, "when a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether this decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court."

So in the case of Voorhees *vs.* the Bank of the United States, 10 Peter's 474-5, the court say: "the line which separates error in judgment from the usurpation of power, is very definite, and is precisely that which denotes the cases where a judgment or decree is reversable only by an Appellate Court or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case it is a record importing absolute verity: in the other mere waste paper."

The foregoing authorities as well as many others not supposed necessary to be referred to, clearly show that judgments of courts of general or competent jurisdiction, are not considered under any circumstances as mere nullities, but as records importing absolute verity and of binding efficacy, until reversed by a competent appel-

late tribunal. They are voidable: not void. The Supreme Court of Florida decided in the case of Parkhill's Administrators *vs.* the Union Bank of Florida, the judgment of the court below was erroneous. It did not decide it was void.

While then the judgment of the Superior Court which has already been shown to have been a court of general and complete jurisdiction remained of record, and unreversed, importing *per se* absolute verity; and possessing by virtue of the authority of the court in which it was rendered, a binding efficacy, an execution issued thereon, and was placed in the hands of the proper officer of the court, who levied the same on the negroes in controversy in this suit, being the property of the estate of Samuel Parkhill, deceased, against whose representation that judgment was rendered and after having duly advertised the sale thereof proceded on the designated day to offer said negroes for sale at public outcry to the highest bidder. At which sale the defendant in this action below, Wm. G. Ponder, being the highest bidder became the purchaser and paid for and obtained the delivery to him of the said negroes. This then being a case of a purchase under an execution issued in conformity to the statute in such case provided, under a judgment rendered by a court of competent jurisdiction, and when execution issued of binding efficacy, it is sufficient to give the purchaser a good title. Armstrong *vs.* Jackson, 1 Blackford, 210.

The judgment of the court, the execution and the bill of sale of the Marshal, were all in evidence in this case, and this was all the defendant was required to shew. Lessee of Cooper *vs.* Galbraith, 3 Wash. C. C. R., 550, and cases there cited. Also Simms and Wise *vs.* Slacum, 3 Cranch, 300. In which last issue C. J. Marshal says, "the judgments of a court of competent jurisdiction (although obtained by fraud) have never been considered as absolutely void, and therefore all acts performed under them are *valid* so far as respects *third persons.*"

The plaintiff in this action in the court below proved that there were nine other executions issued from the same clerk's office on judgments rendered by the same Superior Court, at the same term, and on the same state of pleadings as in the case of the Union Bank of Florida against Manly and wife Administrators of S. Parkhill, in favor of other plaintiffs which judgments have never been appealed from, or in any wise reversed, and which are now irreversible because by limitation no appeal or writ of error can be now ob-

tained,—and under which other executions a levy and sale of the negroes in this controversy, were also had and made at the same time and place. In the case of Voorhees *vs.* the Bank of the United States, 10 Peter's R., 475, the court state the doctrine and say "there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well merited reproach to our jurisprudence if an innocent purchaser no party to the suit, who had paid his money on the faith of an order of court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it. A purchaser under judicial process, pays the plaintiff his demand on the property sold; to the extent of the purchase money he discharges the defendant from his abjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment, and it shall not be permitted, that the purchaser shall be answerable for defects in the record, from the consequence of which the plaintiff is absolved. Such flagrant injustice is imputible neither to the common or statute law of the land. If a judgment is reversed for error, it is a settled principle of the common law coeval with its existence, that the defendant shall have restitution only of the money. The purchaser shall hold the property sold, and there are a few, if any states in the Union who have not consecrated this principle by statute."

It was urged in argument in this case, that the writs of execution were illegally levied. The judgments being against Manly and wife, administrators, and not against them and Moseley, administrators *de bonis non* of S. Parkhill, deceased.

The executions were commanded to be levied on the goods, &c., of Samuel Parkhill, deceased, in the hands of Manly and wife, administrators, &c. That the goods were the goods of S. Parkhill, deceased, and in their hands, is averred in both counts of the declaration: it is true they allege them to have been the goods, &c., of S. Parkhill, deceased, and to have been possessed by them together with William D. Moseley, the other plaintiff in this suit, as administrators *de bonis non*. Now the judgment was against them as administrators, and the execution went against them as such, to be

ed of the goods, &c., of their intestate, by reason of his indebtness; the execution was levied on his property, and went to pay his debt, and *pro tanto* to relieve his legal representatives. If one sued as executor, when he is administrator, it must be pleaded in abatement—he cannot set it up in bar, because it is the same right, and but by another name. Granwell *vs.* Sibley, 2 Lev., 190. Harding *vs.* Salkin, Comb., 220. Powers *vs.* Cook, 1 Lord Raymond, 534.

If debt is brought against two as executors, they plead judgment against one of them as administrator. This is good to bar, because there was a true debt due, and a recovery upon the right of the debt. Parker *vs.* Amys, 1 Lev., 261. So the administrators *de bonis non* in this case might plead a former recovery against some of them as administrators, and a payment by one as administrator would be good in bar to prevent a recovery against the whole as administrators *de bonis non.*

The court are aware there is a conflict of authorities on this point. In the recent case of Taylor and others *vs.* Savage, 1 How. S. C. R., 282, the court say, (Chief Justice Taney delivering the opinion,) "The decree in the Circuit Court is against George M. Savage, executor of the last will and testament of Samuel Savage, deceased. There was no other party respondent in the District Court, and the decree was passed against him in his representative character. Before the appeal was prayed on either side he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it, by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appeal in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had in the District Court until Benham, the administrator *de bonis non*, was made a party." It further appeared in this case by affidavit, that after appeal granted, and the record was made out and sent up, (for no notice was taken of it on the record,) execution had issued in favor of the appellant. The court say, "In this view of the subject, it follows that the execution issued on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one should be made by the Marshal."

William G. Ponder, vs. W. D. Moseley and others, Administrators.

In the case of Jewitt vs. Jewitt, 5 Mass. R., 275, Chief Justice Parsons says, "that it is a good plea in bar against an administrator, that since the commencement of the action against him, he has been removed from office by the Judge of Probates." "If the matter of the plea be good, it shows that the plaintiff has no cause of action against the defendant, either on this or other writ. It is, therefore, properly pleadable in bar."

I have not been able to perceive the precise analogy of the last case cited to the present one, although by the revocation of letters of administration to Mrs. Manly and her husband on the estate of S. Parkhill deceased, if letters of administration *de bonis non,* on the estate of the decedent had been granted to any other person, the plea would be good in bar because no action could be maintained against them as administrators on that, or any other writ, yet when the same identical persons are appointed administrators *de bonis non,* to succeed themselves as administrators on the same identical estate, and on which the same plaintiff claims to have a cause of action, it seems to me that although the writ on which the suit was progressing might not be properly allowable, yet another writ might be given against the defendants on which suit could be maintained, to wit: a writ against Martha Ann Manly, late Parkhill, and Hiram Manly in right of his wife, and William D. Moseley, administrators *de bonis non* of Samuel Parkhill, deceased, the two former being the same identical persons, and not different, defending by representation the same identical estate. Whereas, if as administrators they pleaded a good plea in bar, when they came to be sued as administrators *de bonis non,* jointly with Moseley, for as much as the plaintiff's action would be barred as to them, it would be barred against the administrators *de bonis non,* because being joint, they are as one person in law for the purpose of representing the estate, and this would be, to make the revocation of letters of administration to Mrs. Manly and her husband, a good plea in bar to the plaintiff's action. I cannot think the plaintiff should lose his right of action, or his demand (if one be due him) for such a cause.

In the case of Taylor, et al., *vs.* Savage, Chief Justice Taney in delivering the determination of the Supreme Court announced the execution in that case void and very properly as a consequence said no right of property will pass by a sale under it. The recognized doctrine everywhere is, that a sale under a *void* execution will not pass property to the purchaser. The reason on which the Chief

Justice founded his determination is that in that case there was no defendant in court, the executor having ceased to be the *representative* of the estate of Samuel Savage, and administration having been committed to a different person. That the executor had no right to interfere with the estate by prosecuting, or appearing to an appeal, or in any other manner. If the administration *de bonis non*, had been committed to the same person the case would have been distinctly different, and the execution would not have been void, but at most voidable. In this case we have seen the defendants Manly and wife not only in court pleading after the revocation of their letters, and subsequent re-appointment to the same trust as administrators *de bonis non*, but they pray a writ of error—it is allowed them. They apepar in the Superior Court, are recognized as competent parties, maintained their writ of error, and the judgment below is reversed upon their motion.

They must therefore have been competent parties whom an execution might issue, upon a judgment unreversed and unappealed from, and which itself was not void but erroneous. The execution in this case was therefore only voidable, and under such an one a the case of Taylor, et al., *vs.* Savage. But in the case under conpurchaser acquires a right of property, and is distinguishable from sideration before the Supreme Court, the question of the character of the execution did not properly arise, no question was made by the record, or was necessary to the determination in the case. The character of the execution was not discussed, no authorities on the point were referred to by counsel, or the court; with very great respect for Chief Justice Taney, I incline to think his decision of that point may be regarded as rather an *obiter dictum*.

But the defendant in this case relies on an estoppel *in pais*, as also protecting him in the purchase of the negroes in controversy. I shall not stop to consider the doctrine, but content myself with a reference to the cases of Cotten *vs.* Williams, Flor. Rep., 54, and Camp *vs.* Parkhill's administrators, decided at this term, for the doctrines of estoppel *in pais*, which I need hardly add have the sanction of my approval.

I will look at the facts of this case. Before the day of sale, one of the slaves purchased by Ponder applied to Moseley, one of the plaintiff's to purchase her. He declined (because he said he was unable,) but recommended her to apply to Ponder who owned her husband. She went to Ponder accordingly, and thereafter he attend-

ed the sale; at the sale Moseley was present—advised Ponder to purchase, and upon suggestion about title, said there would be no difficulty—said that he had hired the negro, and that she would suit Ponder. Moseley took an active part in separating and parceling the negroes so as to make them bring the best price. Mr. Archer, attorney for Mrs. Manly, forbade the sale, because he said the negroes were subject to her dower. Moseley expressed disapprobation; said the sale had better go on, that the negroes could not be sold at a better time. Said audibly to the crowd, bid up, bid up gentlemen, the property is not bringing half its price. The title will be good. And thereupon the property sold better. Moseley bid at the sale as high as $800 for one negro woman, and at least bid for two slaves at that sale.

Manly also was there and kept an account of the sales: asked William Bloxham, a witness, to bid against Col. Gamble, who was buying slaves for Meintzhagen without competition. Witness did so and caused the slaves bought by Gamble to bring at least $1500 more than they would have done. During all this time we hear nothing of a void judgment—a void execution—or a bad title to property—or an improper levy on property. The only claim interposed is for Mrs. Manly's right of dower. The parties even seem to waive that, and *a fortiori* any other claim—and it is most certain, it is not now the pretext for this attempted recovery.

The administrators *de bonis non* were present assisting at and encouraging and aiding this sale. The property sold according to testimony at its fair value. Can now any reasonable person arrive at any other conclusion than that the condition of the purchaser or purchasers was or were changed by this conduct. Suppose these administrators by themselves or their attorney with their assent, had said: This property has been wrongly levied; it is the property of the administrators *de bonis non* of Parkhill deceased; it has been levied on as the property of the administrators whose letters have been revoked. The judgment is void. The execution is void. The whole mater is illegal, and purchasers will buy at their peril. Would the property under such circumstances have brought fair value. Would Ponder who is represented as a prudent, cautious man, have become a purchaser. Was not in fine, a belief induced by the conduct of these administrators which caused the purchaser Ponder to change his previous position. If so, (and so we think) then by the law of estoppel they are concluded from

averring against Ponder a different state of things existing at the same time.

The foregoing remarks and authorities referred to, rightly considered, we think, shew that the Superior Courts of the Territory of Florida, were courts of general jurisdiction. That the Superior Court of Leon county had and rightly took jurisdiction of the subject-matter in the case of the Union Bank of Florida *vs.* Parkhill's administrators. That the defendants in that action were legally summoned to answer to that suit, and appeared and pleaded pleas in bar. That that court having competent jurisdiction, both of the subject-matter, and the parties gave judgment in favor of the plaintiff.—That while that judgment was in full force, and when no appeal or writ of error had been sued out on it, an execution issued on said judgment (as well as on sundry other like judgments) from the Clerk's office of said Superior Court, pursuing the judgments on which they had been respectively issued, and acording to law—which executions were all placed in the hands of the Marshal who was the officer of said Superior Court. That by virtue of said execution the Marshal levied upon the negroes in controversy; and upon others being the property and effects of the estate of S. Parkhill, deceased, according to the very right of the case. That under and by virtue of those executions and levy, after having duly advertised, he sold at public outcry, to the highest bidder, the said slaves for ready money. That William G. Ponder, the (defendant below in this suit, and) appellant in this court, because the purchaser, paid for and took possession of the negroes now in controversy. That said judgments being judgments of a Court of Record of general and competent jurisdiction were not and could not be *void:* but valid, unless appealed from, or reversed for error, and therefore voidable only.

That a purchaser at a public sale, under and by virtue of an execution issued upon a voidable judgment, if sale be made before the judgment is reversed, acquires a good title. That nine of the judgments upon which executions issued are valid even if erroneous, the limitation of time for appeal or writ of error having expired. And that there was no iregularity in the levy material to the very right of the parties the true defendant being Samuel Parkhill in his life time and his representatives in right of his estate after his death, and the property levied on and sold, his property to pay his debts, and that the plaintiffs are estopped to deny his title.

The court will forbear to express their sense of the inconvenience which would result in society from the establishment of a rule, which would create uncertainty among buyers at Sheriff's sales under executions issued from the highest courts of record and original jurisdiction. It might perhaps be justly apprehended that such a rule would disarm the courts of the power to redress private wrongs or to enforce private rights.

We are therefore of opinion that the circuit court erred in the instructions under consideration. That the judgments and executions under which the slaves were sold were not *void*. That they gave a sufficient authority for the sale, and that the right of property in these slaves passed by the sale to the defendant or appellant, William G. Ponder.

The foregoing opinion being conclusive of this whole case, the court have not deemed it necessary to look further into the assignment of errors set down in the record.

Per Curiam.—The judgment of the court below is reversed and the clerk of this court will tax costs in favor of the appellant.

HAWKINS, J., said, that he agreed to the conclusions, but not altogether to the reasoning of the court as expressed in the opinion of Judge Lancaster. He was in favor of a reversal exclusively on the ground that the plaintiffs in the court below were estopped by their words and conduct to deny the title of Ponder to the slaves in question.

Le Baron and Colquitt, Appellants, vs. Thos. W. Fauntleroy, et al., Appellees.

CHARLES LE BARON AND WALTER T. COLQUITT, APPELLANTS, *vs.*

THOS. W. FAUNTLEROY, *et al.*, APPELLEES.

A paper purporting to be the will of F. was admitted to probate by the County Court of Escambia, and L. appointed administrator with the will annexed. Under the provisions of the will, L. paid a legacy of $50,000 to the widow of testator. Afterwards the next of kin of F. applied by citation to the County Court for revocation the the probate of the will and the application was refused, but upon appeal from the judgment of the County Court, the Superior Court revoked the probate and set saide the will. Held, that the payment by L. of the legacy did not constitute a devastavit, but on the contrary was a duty enjoined by the obligation of his official oath, and that the next of kin could not recover the amount of the legacy against the administrator.

In such case where the widow and legatee afterwards married and died, her surviving husband is not liable to the next of kin for the amount of the legacy upon suit instituted after death, and simply upon the allegation that the administrator in paying the legacy committed a devastavit.

An appeal from a final decree opens for consideration all prior or interlocutory orders or decrees connected with the merits of the final decree.

This case comes up by Appeal from Decree rendered *pro forma* in Chancery in Escambia county, upon bill filed by heirs of George L. Fauntleroy against Charles LeBaron his administrator, and Walter T. Colquitt who intermarried with the widow of George L. Fauntleroy. The facts of the case and the pleadings appear in the following agreed state of facts and pleadings, and in the opinion of the court:—

The following facts are admitted and agreed upon in this cause:

1st. On the fifth day of November, 1839, George L. Fauntleroy died in Escambia county.

2d. On the 27th day of December, 1839, application was made to the Judge of the County Court of said county, for probate of a supposed will of the said George L. Fauntleroy, deceased, which application was rejected and refused by the court.

3d. On the 22d day of January, 1840, letters of administration were duly granted by said County Court to Charles LeBaron on the estate of said Fauntleroy.

4th. On the 7th day of April, 1840, application was again made

by the widow of the said George L. Fauntleroy, deceased, to the Judge of the County Court of Escambia county, for probate of the said supposed will, and the same was then duly admitted to probate as the will of the said George, on the testimony of George Willis and Judith Fauntleroy, now Caldwell, and there being no executor appointed or named in said supposed will, the same was ordered to be annexed to the letters of administration of the said Le Baron.—The said will was written and executed by the said George L. Fauntleroy about two weeks before his death, and in the words and figures following, to wit:

"Pensacola, 22d Oct., 1839.—In the name of God, amen. I, George L. Fauntleroy, of Pensacola, Florida, do hereby make this my true and only will.

"I give my wife fifty thousand dollars forever, to be paid in bonds, &c. I also give her the Piano, the sets of silver, and the dessert set of China.

"To my slaves Davy, James, Maria Ann, and the children of James and Maria Ann, I give their freedom forever, to be liberated at the expiration of six months from my decease. I give."

5th. On the 25th and 31st of May, 1840, said Le Baron as administration with the will annexed, assented to the foregoing legacy to the widow and paid over to her $50,000 in bonds and notes due the estate, and $302.78, this being the estimated value of the Piano, silver set and dessert of China, as directed in said supposed will.

6th. On the 15th day of October, 1840, the said Aphia having removed to the State of Georgia, intermarried with the defendant Walter T. Colquitt, and on the first day of December, 1840, the said Aphia died.

7th. On the sixth day of October, 1841, the parties complainants herein applied by citation to the County Court of Escambia county for revocation of the probate of the said supposed will of the said George L. Fauntleroy, and a judgment and sentence was pronounced by said court against the application. Whereupon the applicants appealed to the Superior Court of the said county, and the judgment and sentence of the County Court was reversed, and a judgment was rendered in said Superior Court revoking and setting aside said probate of said supposed will. Which judgment was afterwards affirmed by the Court of Appeals.

8th. Said Fauntleroy in his life time was guardian of one Ann

Beatty, a minor, who had some slaves in Florida, and they were hired out by the said George, he receiving the hire and keeping a regular account thereof. On the first of January, 1841, there was due to the said Ann Beatty, $4,341.07, as the balance of said hire, and the same was duly paid over by the said Le Baron to the Guardian of said Ann Beatty, appointed after the death of Fauntleroy.

9th. On the 19th day of August, 1840, said Le Baron, as administrator, purchased at Mobile a draft on New York, drawn by Hart, Anderson & Co., in favor of J. C. Jacobson or order, for $668.57; this sum being then due to said Jacobson, in Virginia, for the boarding and tuition of the said Ann Beatty—no guardian of the said Ann having been yet appointed since the death of the said George L. Fauntleroy. Said draft was duly forwarded to the said Jacobson and by him presented for payment, but the same was not accepted, and was protested. Suit was brought and judgment was obtained against the drawers without delay, and the execution was returned *nulla bona.* Suit was then brought by said Le Baron, as administrator against Ann Beatty and Thomas Heard, (with whom she had since intermarried,) in the Superior Court of Escambia county, to compel them to account to the estate for the amount of said protested draft; and at the June term of the Circuit Court for said county in 1846, the defendants having appeared and answered, the said Circuit Court decreed against the bill and ordered it to be dismissed.

10th. The entire amount of assets which have come to the hands of the said Le Baron, as administrator, (counting the $50,000 paid the widow as so much money, and regarding the amount due Ann Beatty as a part of the estate,) is 80,365.37. The amount paid out by him to widow and distributees, (including the amount of the protested draft of Hart, Anderson & Co.,) and for debts and expenses, is, $80,644.60, besides one thousand dollars paid R. C. Corbin.

11th. The following is a schedule of the persons entitled to claim under the will of the said George L. Fauntleroy, and of the payments made to them respectively by the administrators:

Aphia B. Fauntleroy, widow - - - - - -	$50,302.78
Edmund and Leonard Corbin, through their father and-guardian, R. C. Corbin, - - - - - -	4,500.00
Amount carried forward, - - - - - -	$54,802.78

Amount brought forward, - - - - - -	$54,802.78
Fanny Wyatt, intermarried with G. L. Nicholson, -	2,500.00
Maria Curtis, through her guardian, C. G. Curtis, -	2,500.00
Thomas W. Fauntleroy, - - - - - - -	2,673.35
Judith Fauntleroy, Mrs. Caldwell, - - - -	3,676.59
George Willis, guardian of his children, - - -	3,595.00
	$69,747 72

WALKER ANDERSON,
Solicitor for Complainants.
BENJ'N D. WRIGHT,
Solicitor for Defendants.

1. The bill states certain facts as a ground for relief, which are set forth in the agreement as to facts entered upon the record, and prays for relief.

2. Charles Le Baron, one of the defendants, demurs generally to the bill, and specially in that he is bound to settle his accounts, as administrator, in the County Court of Escambia.

3. Walter T. Colquitt, defendant, pleads, and for plea saith, that the will of Fauntleroy was duly admitted to probate, in which a legacy of $50,000, in bonds, &c., was bequeathed to Aphia Fauntleroy, widow. That, in pursuance of the will and probate, the administrator, Le Baron, delivered to the said Aphia the said sum of money in bonds and notes.

4. Charles Le Baron pleads, and for plea saith, what Colquitt said in his plea, adding, thinks at the time of his payment to the widow, the probate of the will was in full force and unrepealed.

5. Charles Le Baron answers, that he has filed a correct statement and account of the assets of the estate of Fauntleroy, together with an account of payments and distribution of the same, so far as administered, and an account of the assets yet unadministered.

6. Decree of the Superior Court.

And now at this day a decree was made by the court, and is in the following words and figues, to wit:

Fauntleroy and others,
vs.
Charles Le Baron, Administrator, W. T. Colquitt and Henry Ahrens. } In Chancery, Nov. T'm, 1843.

The exceptions taken to the report of the clerk, and Master in this case having been overruled, the cause was then submitted upon

bill, answer, plea, and demurrer. It appears that some time in the year 18—, George F. Fauntleroy departed this life, leaving a paper writing purporting to be his last will and testament, which was admitted to probate in the County of Escambia. The letters of administration, with the said *"will"* annexed, were granted to Charles Le Baron; that by said supposed last will and testament, fifty thousand dollars in good notes and bonds, &c., were bequeathed to Aphia Fauntleroy, widow of the said George F. Fauntleroy, dec'd; that by authority of said "letters testamentary," said Le Baron took possession of the estate of said Fauntleroy, and paid over to the said Aphia (widow) the said legacy; that said Aphia subsequently intermarried with the said W. T. Colquitt, and shortly thereafter died; that subsequent to said probate payment of the said legacy, and intermarriage of the said Aphia with the said Colquitt, proceedings were instituted to set aside and annul said probate, and resulted in a final decree, declaring the said paper writing not to be the last will and testament of the said George F. Fauntleroy.—It also appears that the legacy aforesaid was paid, before proceedings were instituted to set aside the *will*, and while the probate aforesaid was unrevoked, and before any notice had been given of an intention to revoke the same.

It is therefore ordered, adjudged and decreed, that the plea filed in this cause by the said Colquitt be sustained, and the bill dismissed as to him; for should the legacy, thus paid to the said Aphia, before her intermarriage with him, be excessive of her distributive share as widow under the laws of Florida, then the right of the other "distributees" (if they had any) to sue for this excess should have been exercised before the death of the said Aphia—for by her death her coverture with him was dissolved, and he was no longer responsible for any liabilites existing against his said wife anterior to her marriage with him, and which might have been enforced jointly against them during the coverture. It is further declared to be the opinion of this court, that the said Le Baron did not commit a *devastavit* in paying over the said legacy to the said Aphia, before a revocation of the probate, or notice thereof, and before suit brought to invalidate and set aside the said *will*. It is further ordered that the demurrer filed in the case by the said Le Baron be overruled, and he is hereby ordered and decreed to distribute amongst the complainants, their respective proportions of the assets remaining in his hands after paying the aforesaid leg-

acy, and deducting the costs, charges and commissions incurred, in administering said estate. It is further ordered, adjudged, and decreed that this suit be dismissed, so far as it seeks to make Henry Ahrens the security of said Le Baron on his administration bond, a party defendant, for in case of a default, or devastavit by said Le Baron, the remedy against said surety, would be in an action at law upon the administration bond.

DILLON JORDAN, Judge.

7. From this decree an appeal was taken by defendants, and the Court of Appeals decreed as follows:

George Fauntleroy and others,		Appellants
and		
Charles Le Baron, Walter T. Colquitt and Henry Ahrens.		Appellees and Defendants.

Upon an appeal to a decree of the Superior Court for the Western District for the county of Escambia.

This cause coming on to be heard on an appeal from the decree of the Superior Court of the Western District sitting as a Court of Chancery in and for Escambia county, and after hearing the arguments of Mr. Anderson and Mr. Brokenbrough, of counsel for complainants, no counsel appearing on behalf of defendants, and after inspection and examination of the record in said cause, and due deliberation being thereon had, it is ordered, adjudged and decreed, and this court by virtue of the power and authority in it vested, doth hereby order, adjudge and decree that the decision and decree of the said Superior Court of the Western District, made and entered in this cause, at the November term of said court, in the year 1843, be and the same is hereby in all things reversed, annulled and set aside, except as to so much of said decision or decree of November term 1843, as directs or decrees that the bill of complaint shall be dismised as to the said Henry Ahrens, and the said decree, so far as the same declares that the said Ahrens is not properly a party to this suit, and ought not to be included in the bill of complaint, is hereby affirmed. And it is hereby ordered and decreed that the said bill be dismissed as to the said Ahrens, without prejudice however to the future rights of the complainants. And it is further ordered, adjudged and decreed, that so much of the previous or interlocutory decree in this cause, (made before the final decree of November, 1843, aforesaid,) by the said Superior Court as ajudged, ordered or decreed the complainants' bill of complaint to be dis-

missed as to the said Colquitt, and so much of said interlocutory decree as orders and directs the said bill to be dismissed so far as it charges the said Le Baron with a devastavit be and the same is hereby reversed, annulled and set aside, and that the remainder of said interlocutory decree be affirmed. And it is further ordered, adjudged and decreed that this cause be remanded to the Superior Court of the Western District, with directions to that court to overrule the pleas and demurrers of the defendants, Colquitt and Le Baron, and to cause them to answer fully and distinctly the complainants bill, and to proceed in said cause according to law and equity, and as to right and justice may appertain. And it is further ordered and decreed that the said defendants, Le Baron and Colquitt, pay the costs of said appeal in this court to be taxed.

8. Walter T. Coquitt answers, setting forth facts already stated and also alleging that certain of the bonds and notes paid to Mrs. Fauntleroy by Le Baron had been lost to respondent, who had incurred certain expenses in endeavoring to collect them; the facts relating hereto will appear by affidavits, to be taken by agreement.

9. The amended answer of Charles Le Baron recites facts already upon the record, and repiles to his accounts, which are filed.

10. Decree of the Circuit Court:

Thomas Fauntleroy, *et al.*, Complainant, vs. Charles Le Baron & W. T. Colquit. } In Chancery, Circuit Court, Western District, Escambia county.

This day came the complainants by their counsel, and the defendants by their counsel, and thereupon this cause was submitted for hearing upon bill, answer and exhibits, and the court having advised and considered the same and the decree of the Court of Appeals of the late Territory of Florida, doth order and decree as follows:

That defendants, Charles Le Baron and Walter T. Colquitt, are properly chargeable in account with complainants, as heirs and distributees of George L. Fauntleroy, deceased, with the bonds and securities in the proceedings mentioned and referred to at the value thereof, delivered by the said Le Baron under the pretended will of the said George L. Fauntleroy to said Walter T. Colquitt, in payment of a legacy to Aphia, wife of said Colquitt, and formerly widow of said Fauntleroy, mentioned in said pretended will.

That said defendants, Colquitt and Le Baron, in accounting for

said securities or their value, and the interest thereon since the date of their respective receipts, are entitled to be credited with the interest in value of said Aphia as widow, and her representatives, in the estate of the said George L. Fauntleroy, that is to say, one half of the clear actual value of the personal estate, (except slaves,) of the said Fauntleroy, with the value of the use of one-half in value of the slaves after the death of the said George L. Fauntleroy up to the death of the said Aphia, and to the value of the use of one-third in value of the lands of said George L. Fauntleroy, deceased, during the same interval: the value of which said uses for life of said portions of the slaves and lands is to be estimated by taking one-half of hires and profits of the slaves, realized or secured during that period by the said Charles Le Baron as administrator, or said complainants; and one third of the issues and profits realized and secured from the land during the same period by said Le Baron, as administrator, or said complainants. Provided, that all payments, (exclusive of the delivery of said bonds and securities to said Colquitt under the said pretended will,) made to said Aphia or said Colquitt, on account of said claim for dower, be deducted as of the dates they may have been respectively made. And provided further, that in estimating the value of the estate of the said Fauntleroy, the estate of Ann Beatty, held by him as guardian of the said Ann Beatty, be not regarded as assets in the hands of the administrator, but that the same be deducted from the fund out of which dower is to be paid to the said Aphia and her representatives.

And it is further ordered and decreed, that it be referred to Owen M. Avery, one of the Masters of this court, to take account of and ascertain upon such proofs as shall be adduced by the parties, after notice to them or their counsel for that purpose, what amount of bonds and securities delivered as aforesaid, under said pretended will, to said Walter T. Colquitt, remains in specie in the hands of said Colquitt, and the value of the remainder which may have been collected or disposed of: and also what is the value of the dower of said Aphia in said estate, estimated upon the principles above laid down—and that the said Master make report to this court, with all convenient speed, upon the matter herein decreed and referred, with such other matter specially stated, as he may deem pertinent, or either of the parties may require to be stated.

GEORGE W. MACRAE,
Judge of South. Cir. Florida, presiding in West Circuit.

11. In obedience to the foregoing decree, the Master presented his report as follows:

And now at this day, to wit: on the 13th day of October, A. D. 1874, O. M. Avery, as Master in Chancery, and in pursuance of the above decree, filed his report herein, which is in the words and figures, to wit:

To the Hon. Thomas Baltzell, Judge and sitting in Chancery for the county of Escambia:

The undersigned to whom was referred by an order of this Honorable Court, to take account of and ascertain the amount and value of certain bonds and securities delivered by Charles Le Baron, administrator of George Fauntleroy, deceased, to Walter T. Colquitt, either remaining in the hands of said Colquitt or collected and disposed of by him; and also to ascertain the value of the dower of Aphia, the widow of said Fauntleroy, and since the wife of said Colquitt, estimated upon the principles set forth in a decree of this court at the fall term thereof held in 1846, and to make report thereon with such other matters as he may deem pertinent to the controversy before the court, respectfully reports:

That his first care has been to ascertain the clear value of the estate of the said George Fauntleroy, coming into the hands of the administrator, which is subject to the dower of said Aphia, late wife of the said Colquitt. 1st. The whole amount of the personal estate reduced to the possession of the administrator, as set forth in his account on file, is 80,285 37. From this amount the undersigned by the direction of the court deducts the amount of the estate of Ann Beatty; which having been found in the hands of the deceased as the guardian of the said Ann, was paid over to her by the administrator, to wit: $4,495. He also deducts as directed the amount received on the sale for the hire of negroes and for house rent. This amount according to the statement of the administrator is $3,276. He finds also amongst the assets reported as received a draft afterwards lost, amounting with charges to $752 13—which he deducts as forming no part of the estate realized. The expenses also of administration allowed by the Court of Probate, including the commissions of the administrator, are also deducted, amounting to $6,169 95. The aggregate of these several items is $14,693 08—which being deducted from the whole amount received by the administrator, to wit: $80,385 37, leaves as the fund subject to the dower of the widow $65,692 29. The half of this amount is

$32,846 14—to which is to be added according to the terms of the decree of this court, the value of the use of one-half of the slaves and one-third of the lands from the death of Geo. Fauntleroy to the death of his widow Aphia. The real estate appears to have rented at $50 per month, and the slaves to have hired at $22 50 a month.—So that the sum of $27 90 a month is to be added to the dower during the life-time of Aphia Fauntleroy, and she having survived her husband 13 months, the gross amount would be $362 70, making the whole dower $33,208 84.

The undersigned reports therefore that this amount, to wit: $33,-208 84, was properly paid by the administrator to Aphia Fauntleroy on the 25th day of May, 1840. And it appearing that on that day, the sum of 50,302 78 was paid to Aphia Fauntleroy, it follows that the sum of $17,093 94 was over paid, and that the administrator and the said Walker T. Colquitt are responsible to the complainants for that sum, together with 8 per cent. interest on the same—which amounting on the 25th Oct., 1847, to $10,142 37, makes the whole amount $27,236 31.

2d. This amount of 27,236 31, due to the complainants, must be divided amongst them in unequal proportions, inasmuch as it appears from the account of the administrator that unequal payments have been made to them.

By a calculation which it is not necessary to spread at large upon this report, the undersigned finds that in order to equalize the shares of the respective claimants the aforesaid sum should be divided as follows, to-wit:

1. To B. C. Corbin, guardian, &c.,	$2,168 75
2. To G. L. Nicholson, husband, &c.,	4,168 75
3. To C. G. Curtis, guardian, &c.,	4,168 75
4. To J. P. Fauntleroy,	3,995 40
5. To Dr. Byrd, guardian, &c.,	6,668 75
6. To A. C. Caldwell, husband, &c.,	2,992 16
7. To G. Willis, guardian, &c.,	3,073 75
	$27,236 31

The undersigned further reports that no testimony has been presented to him as to any losses sustained by the said W. T. Colquitt, on the amount paid over to the widow of George Fauntleroy, except that it is alleged in the answer of said Colquitt, that the amount of loss was about $8000. He is informed by the respective Solicit-

ors of the parties, that further testimony upon this point will be taken at some future period, and he will therefore only observe that according to the principles upon which this report is based, whatever loss sustained by said Colquitt, may by the court be adjudged to fall on the estate of the said Fauntleroy, should be deducted from amount with which he would otherwise be charged.

In conclusion, the undersigned reports, that a large amount of the estate, to wit: More than $14,000 is yet unadministered. The greater portion of this being represented as bad debts, and a part being in process of recovery by law, he submits to the court, that it be left to future adjustment, upon the same principles set forth in this report.

O. M. AVERY,
Master in Chancery.

12. Defendants file exceptions in the following words:

And now at this day, to wit: on the 14th day of October, A. D., 1847, came the defendants by their solicitor, and filed their exceptions to the Masters report, which are in the words and figures following, to wit:

Thomas Fauntleroy, and others,
vs.
Charles Le Baron and Walter T. Colquitt. } In Chancery.

Exceptions taken to the report of Owen M. Avery, Esq., Master in Chancery, made in pursuance of a decree in this cause, dated the 24th day of October, 1846.

1st exception. For that the said Master has in his report excluded the commissions and expenses of settling the estate of the said George L. Fauntleroy, deceased, from among the charges made by the administrator against the distributees, thereby making the same a charge upon the widow's dower; whereas the widow's dower should be estimated and set off without reference to such commissions and expenses, being in this case the entire half of the personal estate, the use for life of one-half of the slaves, and the use for life of one-third of the real estate.

2d exception. For that the said Master in his said report charged these defendants with interest from the 25th day of May, 1840, to the 25th day of October, 1847, on the amount by him declared to have been paid to the widow, over and above what she was entitled to as her dower, when so much interest can be legally or equitably charged.

Whereupon the said defendants except to the said Master's report, and appeal therefrom to the judgment of this honorable court.

BENJ. D. WRIGHT,
Solicitor for Defendants.

13. Final decree of the Circuit Court.

Fauntleroy and others,
vs.
Le Baron and Colquitt. } In Chancery.

This cause coming on to be heard upon the report of the Master, made in obedience to a decree of this court, and upon the exceptions thereto, and the counsel of complainants and respondents being heard, and it being agreed by the parties through their respective solicitors, that a decree *pro forma* shall be pronounced herein, without prejudice to the competency of the Judge by whom the decree is pronounced, to sit in the cause in the Supreme Court, in case there be an appeal: It is, therefore, in furtherance of said agreement, considered by the court, that the said Le Baron committed a *devastavit* in paying over to the said Aphia more than she was entitled to as dower in the estate of her deceased husband; and it is therefore ordered and decreed that the exceptions to the said report be overruled, and that the defendants pay to the said complainant, R. C. Corbin, as guardian of his infant children, the sum of $2,168 75; to the complainant, G. L. Nicholson, the sum of $4,168 75; to the complainant, G. P. Curtis, as guardian of his infant children, 4,168 75; to the complainant, Thomas L. Fauntleroy, the sum of $3,995 40; to the complainant, Dr. ——— Byrd, as guardian of the infant children of Lawson Fauntleroy, the sum of $6,668 75; to the complainant, Robert C. Caldwell, in right of his wife, Judith Fauntleroy, the sum of $2,992 16; and to the complainant, George Willis, as guardian of his infant children, the sum of $3,073 75—these several sums being the amount with interest which was wrongfully paid to Aphia Fauntleroy on the 25th May, 1840, over and above her dower, and that the defendants pay the costs of this suit. And it is further ordered that the said defendant, Charles Le Baron, proceed to administer the residue of the estate in his hands reported by him to be unadministered, and that as he reduces the same to possession, (after deducting the charges of administration,) he shall pay to the said Walter T. Colquitt the one-half thereof, and to the complainants the other half, in the proportions respectively due to each; and that the said Le Baron make

report thereof, as early as practicable, to the Court of Probate for Escambia county.

It is further ordered and decreed that the parties have leave to take further testimony, to be used in the Supreme Court.

THOMAS BALTZELL, *Judge*

Wright, for Appellant.

Anderson, for Appellees.

1. The decree of the Court of Appeals reversing the decree of the Superior Court is conclusive against Colquitt as to his right to retain the legacy paid him.

2. It is also conclusive against Le Baron, the administrator, as to having committed a *devastavit* in paying over the legacy to Colquitt.

3. Supposing it not to be conclusive, they are both responsible to the distributees for the supposed legacy, because the right to the legacy was derived solely from the supposed will, which being a nullity, the legacy was paid in wrong of the distributees.

4. The probate of a will is only operative as *evidence*, and gives no vitality to the instrument itself. 1 Williams on Executors, 159. 5 Ib., 339. Thompson's Dig., 199.

5. The executor derives his title solely from the will, and not from the probate. Ibid. Toller on Ex., 75. 1 Dane's Abridgment, 558. The authority of an administrator to execute a will rests, of course, on the same foundation.

6. The acts referred to by the appellants' counsel, such as the paying and receiving of debts by an executor or administrator, acting under a grant subsequently revoked, differ from the payment of the legacy in question in this: that the former relate to rights pre existing before the grant, while the latter, resting upon a void will derives its sole authority from the probate.

7. The allowance of all the acts referred to by appellants' counsel under the revoked grant, secures the rights of all parties while the allowance of the legacy in question would irreparably destroy the undisputed rights of the complainants. 1 Will. on Ex., 373.

"The rightful representative may either sue the buyer from the wrongful representative in detinue or trover, or he may waive the tort and sue for the money." 1 Williams, 368.

8. The probate of a will is an *ex parte* proceeding, and therefore not binding as a judgment. Thomp. Dig., 193.

9. Le Baron was not *compellable* to pay the pretended legacy at the time he did. Thompson's Dig., 205. See statement of facts.

10. The refunding bond required by our statute, (Thomp. Dig., 206,) strengthens all the previous views on this subject, and provides for the very contingency which has happened, and secures, as it was intended to do, the rights of all the parties.

This bond is unnecessary, if defendants' counsel are correct. 2 Call's Rep., 95.

11. The probate of Fauntleroy's will was *void*, and not voidable as is contended, and consequently the acts under it are *void*. Toller on Ex., 78. 1 Williams on Ex., 367, 368, 369, 370, 371, and note (1.) Exception to the general rule: 3 T. R., 125, Allen *vs.* Dundas.

The apparent contradiction of Toller and Williams is reconciled by noting that the distinction between *void* and *voidable* grants applies to administrations, and rarely (if ever in the country) to probates. The latter when revoked are necessarily void, *ab initio*. 1 Toller, 78, 119, 128, 129, 131. 1 Will., 369, and note (o) 370.

The distinction between repeal upon appeal and citation, applies to grants of administration, and not to probates, the latter being an *ex parte* proceeding.

Voidable administrations what? 1 Williams, 361. Comstock's Dig., 262. 1 Williams, 371, and note (1.)

12. The Ordinary is incapable of divesting the interests of the distributees in this case which vested upon Fauntleroy's death.

13. The act of the administrator being void the complainants should recover from Le Baron and Colquitt, the whole amount paid Mrs. Fauntleroy, because no dower having been assigned to her during her life none can be assigned now, the only mode known to the law being now impossible. Thomp. Dig., 186.

14. If the court should think the widow entitled to retain the difference between the legacy and her distributive share as widow, then the principles upon which the account should be made are correctly set forth in the decree below, and Master's report.

Brockenbrough, for Appellees.

Le Baron and Colquitt, Appellants, vs. Thos. W. Fauntleroy, et al., Appellees.

Colquitt, for Appellant.

First. The decree of the Court of Appeals of the Territory settles no principle of law in the case.

Second. If the decree of the Court of Appeals had decided upon what principles the cause must be settled; still, if in carrying out that decree by the court below, any cause of grievance should justify an appeal, upon such appeal the Appellate Court will examine the merits of the whole cause. 1 Hill's Ch., 450, and authorities there cited.

Third. If the agreement of facts in the fourth statement be, as counsel for complainant insist, conclusive, that the administrator was not qualified according to law as administrator *cum testamento annexo,* after probate of the will, then we insist that he is not administrator at all, and that he is not charged in complainants' bill for any default for which he can be charged as administrator, as the matters of complaint all transpired after his letters of administration were annulled by probate of the will. Williams on Ex., 367.

Fourth. The Court of Probate for the Territory of Florida had exclusive jurisdiction of probate of wills, subject only to the Chancery supervision, as in England, and therefore the Superior Court of the Territory had no jurisdiction of an *appeal* from the Probate Court and their decree upon such appeal was a nullity. Thomp. Dig., 194-5. Ib., 365. Ib., 57-8.

Fifth. The widow has a distributive share of the personal property in preference to all claims, and consequently before the deduction of funeral expenses, &c. That distributive share must necessarily be on the gross amount, and not on the nett sum after deducting expenses of administering the estate. Dower is of the real estate and slaves. Thomp. Dig., 184-5, and notes.

The amount due Ann Beatty was a debt of the estate. 11 Pick. 173. By the statute of the Territory no interest can be allowed but on cash balances, and then only in certain cases. Thompson's 207-8. Williams on Ex., 1131. 12 Vesey, 386.

with charges amounting to 752 13, may be a

administrator should be credit-

Sixth. The complainants' bill makes no allegation by which the defendant Colquitt can be made liable. Story's Eq. Pl., 27. Gresley on Ev., 23.

The bill charges, in its charging part, that the administrator paid Colquit $50,000. This charge is denied by the answer, and is not sustained by proof. The bill further charges, in the charging part of the bill, that a portion of this amount was paid in bonds and notes to the said Colquitt. This charge is denied in the answer, and the complainants offer no proof to sustain it. The answer denies ever having received any of the assets of Fauntleroy's estate, except the same may have been received by his marriage with the widow.—The answer admits that Mrs. Fauntleroy may have received bonds, notes, &c., and if she did so she received them properly, under the will of her deceased husband, and would not have been responsible.

Seventh. If the widow were responsible at all to refund as distributee, she could not have been joined, if alive and a *femme sole*, with the administrator in an action for *devastavit* against him.

Eighth. If the widow could so have been joined, and was legally responsible, as assisting to commit a *devastavit, Colquitt after her death* was not liable. And any suit brought for a *devastavit* committed by the wife against him would be dismissed with costs. Will. on Ex., 1128. 2 Kents Comm.

Ninth. Personal assets cannot be followed when disposed of by an executor or administrator unless for fraud. Will. on Ex., 609. 4 Term, 625. Note to Farr *vs.* Newman, 1 Atkinson, 463.

Tenth. When executor consents to legacy the legatee's title is complete. Williams on Ex., 843, and references.

Eleventh. At what time legacies are to be paid. Time allowed the administrator is for his convenience. Will. on Executors, 853-4.

Twelfth. The complainants' bill in stating its equities against the administrator is a simple bill to account. Story's Eq. Pl., 27.

Thirteenth. What is a *devastavit*, and what the duties of an executor or administrator with will annexed. Williams on Ex., 1104.

Fourteenth. When the administrator paid in bonds and notes to widow, it was in conformity to directions of a valid will accompanying his letters, which he could not refuse to obey. It was not a supposed will—not a pretended will—but an actual will—a valid will, and so declared by a court of competent jurisdiction which

was binding on the administrator, and all the world. The refunding bond to the administrator could not make an act of the administrator which was legal and right when he performed it, wrongful and tortious.

Fifteenth. The after setting aside of the probate of that will upon citation does not make void the acts of the administrator. Williams on Ex., 367-8. Ib., 371, and note 1. Ib., 339. 3 Bac. Abr.,— 51, 61, and notes. 1 Danes' Abr., 581, 564. 1 Bailey Rep., 221.

Sixteenth An executor or administrator stands in the most favored condition of all Trustees. Will. on Ex., 1021. 14 Ed. Comyn's Dig., Assetts D. 2 Vesey, Sr., 240.

Seventeenth. The complainants had been virtually receiving under the will. The widow, of course, yielded her legal rights given by statute in case of intestacy, and those rights were at once distributed among the complainants. It is against the principles of equity, that a party shall derive a benefit from an instrument, and then seek rights adverse to it. Story's Eq., 345, Sec. 1082.

"You cannot come forth to a court of Justice claiming in repugnant rights," are the words of Lord Roselyn. 2 Vesey, Jr., 696. The same opinion expressed by Lord Mansfield, 4 Term Rep., 743, n.

In case of Lord Little *vs.* Baily, Cowper, 597, it is said, "that no court will enforce rights which it recognizes as repugnant, may be admitted as a universal proposition.

Eighteenth. The complainant who swore to this bill, and on whose testimony the will was established, and who is acting for others, consented to the judgment of the legacy under the will, acquiesced in such payment for near 18 months before moving by citation—the other claimants, with full knowledge, acquiescing and receiving distribution, adds to the injustice of seeking to hold the administrator liable, and is contrary to every principle of equity.

BALTZELL, J., delivered the following opinion:

On the seventh day of April, 1840, probate was made by the County Court of Escambia of an instrument of writing purporting to be the last will and testament of George L. Fauntleroy by which he bequeathed to his widow the sum of fifty thousand dollars, a piano, some plate and a set of china, and the will was ordered to be annexed to the letters of administration previously granted to Le Baron there being no executor named in the will.

On the 25th and 31st of May, of the same year, Le Baron acting in obedience to this will and under the probate of the court paid to Mrs. Fauntleroy $50,000 in notes and bonds, and a sum equal to the piano and the other articles.

In October 1841, the next of kin the present complainants applied to the County Court for a revocation of the probate, which was refused. They appealed to the Superior Court who revoked and set it aside declaring the will invalid. An appeal was taken to the Court of Appeals who affirmed the judgment of the Superior Court in 1845.

This suit is instituted against the administrator and against Colquitt who intermarried with Mrs. Fauntleroy, complaining of this payment as a devastavit and insisting not only upon the disallowance of the sum paid to the widow, but of the forfeiture of all interest by her in the estate of her husband.

In support of this position complainants reply upon the difference assumed in the books between acts of an administrator or executor regarded as voidable and those that are void, contending that the action of Le Baron in the payment to Mrs. Fauntleroy was void.

"Whether the acts of an administrator or executor whose probate or letters are revoked, are valid or not, depends it is said upon the character of the grant. The distinction is between grants that are void and such as are voidable. If the grant be of the former description the mesne acts of the executor or administrator done between the grant and its revocation shall be of no validity." 1 Will. on Executors, 400. Toller, 120-8.

"But if the administration be voidable only, all lawful acts of the first administrator shall be valid." 1 Will., 402. Toller, 129.

"It may be laid down as a general rule that where the grant *is in derogation of the right of the executor* it is void, but where the administration is granted by the proper jurisdiction and is only in derogation of the next of kin or residuary legatee it is merely voidable." 3 Bacon Ab., 50. 1 Will., 403-4.

Toller says "in all such instances the administration is a mere nullity. The executors *interest*, the ordinary is incapable of divesting." Toller 120.

It seems according to this that if the grant be in derogation of the interest of the next of kin this does not make the action of the administrator void. Let us enquire as to the interest of the executor which is attended with such important consequences.

1st. He had a right to retain for a debt due to him in preference to all other creditors in an equal degree. Toller, 295.

2d. If indebted to his testator his appointment and acceptance of the office shall operate as a release and extinguishment of the debt. Toller, 347.

3d. After payment of funeral expenses, testamentary charges, debts and legacies, if there be a surplus it shall vest in him beneficially. 2 Will., 898. Toller, 351.

This was the law in former times but by our statute this extinguishment is expressly done away, so is the right of retainer by the same act providing for a pro rata settlement of all demands which may be rendered in according to law, whilst there is no instance of a claim to the surplus with us. Duval, 188. Thus clearly placing an executor on the same footing of an administrator, making him alike with the administrator an agent or officer merely for the settlement of the estate with no further interest than that of commissions and fees.

It will be thus perceived why a grant in derogation of the right of the executor was so highly esteemed in the early decisions, yet when the cases supporting this doctrine, to wit, Parten and Barsdens, case 1 Mod., 213—Dr. Henslow's case, 9 Co., 37, B—Abram *vs.* Cunningham, 2 Lev., 182—Wankford *vs.* Wankford, Salk., 307—Graysbrook *vs.* Fox, Plow., 275, were cited before Lord Redesdale in Doyle *vs.* Blake, he said that "some of these old cases could scarcely be supported on principle, they were decided whilst a great jealousy of the Eccelsiastical Court prevailed. That the meaning of the modern determinations was that an administration granted after an executor having acted *in pais* might be repealed by an application to the Ecclesiastical Court, not that it was a mere nullity unless as a protection to the executor. That it was true an executor having acted could not discharge himself from liability by such an administration being granted to another, but that a debtor to the fund could not in answer to a suit by such administrator set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void only as a protection to the executor, but in no other sense." The case before the court was an illustration of these remarks.—Blake and Atley were appointed executors and after performing some acts which the chancellor considered as amounting to an action by them in that character renounced in favor of a third party,

to whom administration of the will was committed, he becoming insolvent, they were held liable for his administration as if he had been their agent. 2 Sch. and Lef., 246.

Williams on Executors adopts these remarks, and adds, "so if the executor has acted, and the ordinary not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the will, yet the grant of administration, with the will annexed, until so revoked, is valid." 1 Williams on Executors, 162, and notes.

This view is sustained by the case of Allen *vs.* Dundas, which was to recover from a debtor a debt which he had paid to an executor, under probate of a forged will afterwards revoked. The position taken was as in this case, that the probate was only evidence of right; that the executor derives his authority from the will, and not from the probate, and that there was no payment. The court, however said: "Here the defendant acted under the authority of a court of law. Every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject-matter, and every person was bound to give credit to the probate till it was revoked." Buller, Justice, said, "I am most clearly of opinion that it is a judicial act, and that the probate is conclusive till it be repealed, and no court of common law can admit evidence to impeach it." 3 T. R., 129.

See also the case of Digby & Hollis *vs.* Wray, B. R., 25 & 26, Car. 2, the plaintiff as executor had judgment against the defendant, and then there was a suit in the spiritual court to repeal the letters, and the defendant prayed a stay of execution till the matter was tried in the spiritual court—the court denied it, for the reason that if a debtor pay money on a judgment and execution to one who is executor *de facto,* having a probate under seal of a prerogative court, he shall never be forced to pay it again. 3 Bac. Ab., 51.

To the same effect are decisions of the Supreme Court of South Carolina. In Benson, administrator, *vs.* Price & Byers, the court say, when an administration which has been granted is properly revoked, the latter administrator may sue the former for money had and received, or in trover for any goods remaining in his possession, by him converted or not duly administered. Any other doctrine would be fraught with the most monstruous inconvenience. 2 N. & McC., 577.

In Foster *vs.* Brown administration had been obtained by a fraudulent suppression of the will, in which the executor as well as the administrator concurred—it was held that all acts done in a due and legal course of administration are valid and binding on all interested, although it be afterwards revoked, nor can the manner of obtaining the administration, whether fairly or fraudulently, vary the question. 1 Bailey, 221.

In Price *vs.* Nesbit, allusion was made to these authorities, and their application to the case, which was that of a will set up after grant of previous administration enforced. 1 Hill, 461.

So also in Pennsylvania, an opinion was once entertained that payments made to one who had obtained probate of a will which was afterwards repealed were void, and in support of it, 1 Roll. Abr. & Con. Rep., 152, were cited, but those cases have been overruled. The granting probate is a judicial act, and while it remains in force cannot be contradicted. Appeal of Peebles, 15 Sergenat and Rawle, 39.

But there is another consideration showing the entire inapplicability of the rule in the present case, even conceding it to be in operation, when *derogatory to the rights* of an executor. There was no executor by this will possessed of rights to be affected by the action of Le Baron. He was himself filling the office of executor, having been appointed administrator, with the will annexed, and continued administrator after revocation of the probate.

It is contended that the acts of paying and receiving debts by an executor or administrator, acting under a grant subsequently revoked, differ from the payment of a legacy in this, that the former relate to rights pre-existing before the grant—whilst the latter, resting upon a void will, derives its sole authority from the probate. The propriety of the distinction is not perceived. Indeed, to allow it would be to assert that the probate is a judicial act, available to a legatee or creditor of the estate against the officer, but impotent for his protection. This would be to declare a part of his duty as obligatory, and hold him discharged from the remainder. We cannot, however, draw such a distinction. All the duties of the executor or administrator, resulting from the probate of the will, or from the letters of administration, with the will annexed are alike imperative and obligatory. "An executor is he to whom another man commits, by will, the execution of that, his last will and testament, and the duty of an administrator with the will annexed is very little different from

that of an executor." 2 Black., 503. "The executor is bound to perform a will." Ib., 507.

"All administrators, with the will annexed, shall make oath or affirmation before the Court or Judge that they will *well and truly perform the last will and testament of the testator,* and pay his just and lawful debts, &c." Duval's Com. 170.

"A probate is conclusive both in courts of law and equity, as to the appointment of the executor, and the validity and contents of a will so far as it extends to personal property." 1 Williams, 368. Teller, 76.

"The probate is conclusive as to every part of the will in respect of which it has been granted." Ibid, 369. 4 Rand., 538. 2 Ibid, 194.

The will being established by competent judicial action, and this administrator having sworn to perform it, what was his course?—Obviously to pay debts first, if there are none, then to pay legacies and distribute the residuum. If the assets were in bonds and notes, they should have been collected as early as possible, and paid over; but, if the legatee preferred taking the burthen of collection, we see no objection, but on the contrary very great propriety in the executor permitting it.

It was clearly a matter of duty on the part of this administrator to pay legacies under the will as much as to receive debts, and if there be a discharge in the one case, we are at a loss why it should not operate in the other. In the case under consideration there was an express mandate of the court to pay this legacy—an adjudication upon the very point; the very object of the probate, its almost entire object was to procure its payment, and the officer was bound as well by his office as by the solemn obligation of his oath to pay it. To refuse payment would have been alike inconsistent with both of these. To enforce a performance of duty by such injunction, and then subject the officer to peril of his fortune, if through a diverse action of the parties interested, or a change of opinion as to the law by the courts whose agent he was, would be in our opinion the height of injustice. In the case of the debtor protected as we have seen by the probate, as a judicial act there was no mandate, but mere obligation to pay. If the comparative loss is to be regarded, distributees may be as much affected by improper and illegal receipts, and payments by an executor or administrator, as by the improper payment of a legacy. The remarks of the court in Allen *vs.* Dun-

das, are so appropriate as to deserve a more special reference on this branch of the subject. Ashurst, J., said "I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who *had at that time a legal authority to receive it.* It is admitted that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it, but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it." 3 T. R., 129.

If there were yet doubts, we think there is express authority in support of the view we have taken. In Hele *vs.* Stowel the husband devised his lands to his wife during the minority of his son, with power to make leases, to pay debts, &c., and dies, &c., the wife enters and takes the profits, and then marries a second husband, and he lives some years and takes the profits and dies, and the wife continues to take the profits, &c. The son *attains his age,* and proves a revocation of the will, and prays an account. The account was ordered. She was to answer as to what her husband took as in a *devastavit*—the wife having *no notice of the revocation had paid legacies* charged on the lands by will. Ordered that she be *allowed those* Cases in Chancery, 126, quoted 3 Bac. Ab., 50 n. 3. 1 Lomax on Ex., 190. Inaccurately stated in Williams on Ex., p. 406.

We do not perceive that there is any thing in the position that Le Baron was not compellable to pay at the time he did or that the statute allowed him to take a bond to refund. It would not have altered the legal bearing of the act, if payment had been made after the six months fixed by the statute, for the movement against the will took place upward of a yeard after the grant. This time is for the convenience of the executor to ascertain the debts of the testator and the amount of the assets so as to make a proper distribution. 1 Will. 855. Bonds seem to have been required, by the ancient practice in Chancery, of a legatee to refunnd if debts should appear, but it is now out of use. It was for the protection and benefit of the Administrator which he might waive as he might the payment before six months. 1 Story's Equity, 605.

We have not noticed the obvious distinction between cases commenced by citation before the ordinary to revoke a probate and those

by appeal from his decision depending before a superior judicature for the very obvious reason that the payment was made before either appeal or citation.

We have by no means overlooked the cases in which a legatee as well as an executor have been held liable for payments illegally made to or received by them. Such are abundant in the books but they are cases of fraud in which the wrong doer whoever he may be is converted into a trustee. 4 T. R. 625. 1 Atk. 463. 1 Will. 609—370-1-2.

But there is no pretext for anything of the kind as to this payment either on the part of Mrs. Fauntleroy or Le Baron. Indeed the probate of the will was made on the affidavit of two of those who are now complainants in the bill, and another fact is to be remarked that there was no movement to disturb it until after the death of Mrs. Fauntleroy. But the liability is asserted in the bill on account of a devastavit charged to have been committed by Le Baron. Let us see whether this view of the subject is sustainable. "Devastavit is defined to be a mismanagement of the estate and effects of the deceased in squandering and mis-applying the assets contrary to the duty imposed on them for which executors and administrators shall be responsible out of their own pockets as far as they had or might have had assets of the deceased." Bac. Ab., Ex. L., 1. Will. Ex., 1105. Toller, 424.

It is under this head Williams says "An executor is personally liable in Equity for all breaches of the ordinary trusts which in courts of Equity are considered to arise from his office. And it may here be observed that where personal property is bequeathed to executors as trustees, the circumstance of taking probate of the will is in itself an acceptance of the particular trusts; therefore when the will contains express directions what the executor is to do, an executor who proves the will must do all which he is directed to do as executor, &c. Will., 1104. Meeklow *vs.* Fuller, Jacob. 198.

Now it will hardly be contended that the administrator Le Baron could be held liable for not obeying the will by refusal to pay this money and again liable for paying it. We are then of opinion that in equity and justice as well as by the principles of law Le Baron should not be held liable for the payment of this legacy to these complainants.

The question yet remains as to the responsibility of Colquitt.—In reference to this we have no hesitancy in saying that if the pay-

ment made to Mrs. Fauntleroy could not be supported under the will of her husband, that it should and ought to be so far as her distributive share as widow extended. If a mistake was committed by her in common with others interested in the estate, as well as by the tribunal whose office it was to adjudicate as to the legal effect of the paper set up as the testament of her husband, it certainly should not operate to produce a forfeiture of her interest as a distributee.

A salutary rule of a Court of Equity is to regard that as done which ought to have been done, and rather than declare a forfeiture of the widow's right, Equity would regard the payment as made to her originally for her distributive share and not as a legacy. This share does not reach the amount paid her by Le Baron and the enquiry is as to the liability of Colquitt to make the deficiency good. Whether such a liability may be made out against him is not the question before us. We have to decide whether the complainants have by their pleadings and evidence, made a case entitling them to relief in a Court of Equity. The allegation as to his liability is to this effect, "your orators further charge that said Le Baron has committed a devastavit upon the estate of his said intestate and wasted the same by paying a large portion thereof, to wit the sum of fifty thousand dollars to the aforesaid Walter Colquitt under pretense of a legacy having been left to the said Aphia in a pretended will of said deceased, which pretended will has long since been pronounced by a court of competent jurisdiction, to be invalid &c., and that said Le Baron and Colquitt have combined and confederated together most unjustly to detain from your orators the said sum of fifty thousand dollars so illegally paid by said Le Baron to Colquitt, and they further show that a portion of the said estate of said Fauntleroy so illegally paid to said Colquitt consists of bonds due by sundry persons, to wit, (here a blank) to the said estate and that many are now in suit by said Colquitt as assignee of said Le Baron and is thereby reducing the same to his possession." Here there is the simple allegation of devastavit against Le Baron for paying to Colquitt, though both are charged with combining to detain the $50,000. Now this charge of payment to Colquitt is expressly negatived by the agreed case showing that on the 25th and 31st of May, 1840, this sum was paid to Mrs. Fauntleroy before her marriage. So that if a decree was rendered in favor of complainants against Colquitt it would be on grounds directly opposed to and falsifying the statements in their bill. It would be without allegation

and against proof. We hold it to be very clear too that a mere charge of confederacy against a party is not the foundation for the jurisdiction of a Court of Equity. Story's Eq. pl., 25-27.

The whole case against Colquitt is clearly predicated on the idea of Le Baron's having committed a devastavit and that failing, the plaintiffs' case would seem to fail also as to him. This case in distinct and separate in its character from the distribution and may be better adjudicated by itself than in connection with it. The complainants had permission too of which they did not avail themselves to amend their bill, and cannot complain now of the dismission for want of it.

We are therefore of opinion that the bill should be dismissed as to Colquitt, without prejudice to the institution of another suit against him, if the parties think they can maintain one for the difference between the amount of the legacy and the distributive share of Mrs. Colquitt. In the mean time the present suit will proceed for distribution against Le Baron as to the residue of the estate crediting to him the sum paid on account of the legacy. This view of the subject disposes of the exceptions to the master's report.

This same case was before the Court of Appeals of the late Territory at their January Term, 1845, and they holding different sentiments and opinions as to the law of the case, reversed the decree of the Superior Court which had dismissed the suit as to Colquitt, and declaring that Le Baron had committed a *devastavit*, required them both to answer. This decision, it is contended, is conclusive in this court as to the rights of the parties having been made by a court having full jurisdiction of the subject-matter. This question was very fully considered by the Supreme Court of South Carolina in the case of Price's Executors *vs.* Nesbit, in which the court after reviewing their own decisions and those of New York, held that the appeal from a final decree would, if pursued, open all prior decrees whether of the Chancellor or Court of Appeals. 'So long as a decree operates,' it was said, 'merely as authority or as the reasoning of the court to prove the party's right in whose favor it pronounced it may be reviewed and reversed whenever it comes properly before the Court of Appeals, in any of the subsequent stages of the case." The opinion of Chief Justice Spencer in the Court of Errors of New York, was quoted with approbation, concurred in, as it was, by the whole court. "An appeal from a final decree opens for consideration all prior or interlocutory orders or de-

connected with the merits of the final decree." 17 John, 548.—1 Hill, 547.

There could scarcely be higher authority than this in support of a legal proposition, yet without holding it decisive, and reserving the point for a more careful consideration, there is in our opinion in the record and in the opinion and mandate of the court sufficient to shew that it should not conclude the rights of either Le Baron or Colquitt.

There is no where in the record, or amongst the papers, any evidence of an appeal prayed or taken either in the Court below or before the Clerk, nor does notice appear to have been given to the adverse party of the appeal. The mandate of the court itself states that argument was heard of counsel for complainant, but that "no counsel appeared on behalf of defendants." It is true the name of an attorney for defendants is marked on the docket of this court at that time; but at the most this is an equivocal act. In the Circuit Court by statute the name of an attorney operates to prevent a judgment by default in common law cases; but we are not aware that of any law declaring its effect in a case of Chancery or in the Court of Appeals. Does it amount to notice of an appeal by the other side, and of the pending of the suit in the Appellate Court. But again it is insisted by appellants that, that court had not the facts before it, and therefore its decision could not be conclusive, and we are referred to the opening of the opinion commencing as follows: "It is difficult from the very imperfect record before us, to ascertain either what the real questions in the cause are, or what decree ought to be given upon the record, and were we not aided in some measure by the *admission of complainant's counsel on the argument* and by some references to facts in the opinion of the Judge in the Court below we should find it still more difficult. Disregard, however, the defects of the record as much as possible we shall endeavor to express our opinion on the main points or questions upon which the *parties* desire a decision as we undertsand them, from the argument at bar as well as from the record."

In declaring the plea of Colquitt bad, which the court did, on grounds that neither the will nor probate were set out in the plea, nor any averment that the $50,000 paid to Mrs. Fauntleroy were the same $50,000 charged in the bill to have been paid to Colquitt, and no answer connected with the plea as required by the statute, they say, "it should be observed, however, that in the opinion of

the judge below, a state of facts is set forth which do not appear upon the record, and upon which it would seem that the decision of the court below was predicated, and which might form *a good ground for the decision of the court below;* and we are not prepared to say, that if the facts set forth in the opinion of the judge were spread upon the record, and those were the only facts of the case, that the *decision might not be entirely correct.*" They then direct him to answer fully, and that in doing so he compromits no rights—and if upon the coming in of his answer it clearly appears that he is not properly a party to the suit, the bill may be dismissed.

Even as to Le Baron, they say, "the court below in its decision considered that the payment or delivery of the $50,000 of securities by the administrators to Mrs. Fauntleroy, who was justified by the then existing probate of the pretended will, and in the opinion of that court this conclusion is arrived at upon a state of facts set forth in the opinion, *which nowhere appear in the record,* and upon which that court came to the conclusion, that although the will was annulled and declared void, and the probate of it revoked, yet that Le Baron is not bound to refund, &c.

Now, turning to the opinion of the court below, we find these facts stated as the ground of its opinion. "It is declared to be the opinion of this court, that Le Baron did not commit a *devastavit* in paying over the said legacy to the said Aphia, before a revocation of the probate, or notice thereof, and before suit to invalidate the said will." Perhaps with the facts now before us, the Court of Appeals might have come to the conclusion we have taken in common with the Judge of the Superior Court.

We are, therefore, of opinion, that, under these circumstances, the decree of the Court of Appeals should not be held to conclude the defendants in this case, as contended for by complainants. The decree of the court below will be reversed and set aside, with directions to dismiss the bill as to Colquitt, and to allow the payment by the administrator of the legacy, and for further proceedings not inconsistent with this opinion.

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

ROBERT W. WILLIAMS, APPELLANT, *vs.* WILLIAM D. MOSELEY, FOR THE USE OF PATRICK SMITH, APPELLEE.

H. as principal and W. and C. as sureties, executed notes payable to B., as guardian of the heirs of F., upon the purchase by H. of lands belonging to the wards. B. the guardian died, and H. was appointed his successor, who, upon a settlement as guardian with the executor of B., his predecessor received among other things the note executed by himself, and gave receipts as guardian to the executor of B., as for so much money. He afterwards, at the instance of C., one of his sureties, cut the names of W. and C. from the notes. In his accounts filed in the County Court, H., charged himself with a large sum, comprising nearly all the estate of his wards received from the executor of B., as received in "notes and accounts." H. died, and S., who was appointed his successor as guardian, instituted suit in the name of the executor of B., for his (S.'s) use as guardian, against W., one of the sureties on the notes. Held, by a divided court:

That the notes were not extinguished, and that S. was entitled to recover the amount of the notes.

A note payable in "current Florida money," is payable in good funds.

Appeal from judgment rendered in Leon Circuit Court in favor of appellee, for $4,122 24-100, on 23d May, 1846.

This cause was argued at the last term, and also a second time at this term, when the judgment of the court below was affirmed by a divided court. The facts of the case fully appear in the opinion delivered by the Justices.

D. S. Walker, for Appellant:

The first question presented by this record, is whether the notes sued on were the property of Arthur Burney at the time of his death, as alleged in the first instruction asked for. That they were would seem to be admitted by the institution of this suit in the name of his executor Moseley. But as this proposition is in some sort denied by the court below in refusing to give said instruction and in giving the first it gave in its stead, we present the following authorities to sustain it: Chitty on Bills, 160, and cases cited—Same, 358. Story on Promissory Notes, page 130, sec. 125—page 461, sec. 375—page 132, sec. 126—page 296, sec. 250—page 129, sec. 123. Bailey on Bills, 335, and notes—same, 76. 1 Vermont 500.

The error of the court is, in declaring the notes themselves to be the *trust* property of Arthur Burney, in contradistinction, as we sup-

pose to the legal property, must have been fallen into by confounding the *paper and ink* used in making the notes, with the money intended to be secured by them. That the *money,* had it been collected by Burney, would have been holden by him in *trust* for his wards is true, but the notes themselves were not his trust property. See Story on Promissory Notes, 122, sec. 126.

2. It being true, then, that the legal title to these notes was in Burney at the time of his death, it follows that that title passed to Moseley as his executor. Therefore the next question is, whether Moseley was not divested of that title by voluntarily delivering them to Hart, the principal obligor, in consideration of his receipts for so much money. These receipts were valuable to Moseley, because they were vouchers sufficient to discharge the estate of his testator, Burney, from the debt it owed to Farmer's heirs. Story on Promissory Notes, 540, 503, 504.

The receipts Hart gave are "binding" upon the heirs of Farmer, so as to preclude them from ever setting up this claim against Burney's estate. See Thompson's Digest, page 201. If, then, with these notes Moseley has paid off and discharged a debt that was valid and subsisting to their full amount against the estate of Burney, how can it be pretended that he still has title to them? If, then, Moseley has no legal title, this suit cannot be maintained in his name; and if his right of action was even suspended, he cannot resume it now. 2 J. R., 471. 5 Peters S. C. U. S., 267.

3. But it is further contended that these notes were cancelled by being delivered to Hart, and by the names of Williams and Chaires being cut therefrom; and that even if such cancellation has been fraudulent, (which is by no means admitted,) a suit *at law* cannot be maintained upon them. A cancelled note is no note at all; but if the cancellation is procured by *fraud,* a Court of *Equity* may relieve against such fraud, by compelling the obligors to pay the money just as if the note had not been cancelled. This power does not appertain to a court of law; our statute in regard to the mode of suing at law upon lost notes makes no provision for a suit at law upon cancelled notes. It is obvious that this cancellation took place with the approbation of Moseley, who had been the legal owner, and Hart the principal obligor, to whom they had been delivered as aforesaid. If this was a fraud, it cannot be relieved against in a court of law, but relief can only be had in a Court of Equity. See

Daniel's Chancery Practice, 504, 505, in new law library, 298, and cases there cited.

4. But the main question in this cause still remains to be discussed; for it is obvious that if it shall be dismissed merely because a wrong party is suing, or the suit is instituted in the wrong court, the ultimate liability of Williams will not be thereby determined. That question is, whether Williams is liable to any person, in any court, upon these notes. We contend that when Hart, the principal obligor in these notes, became possessed of them as the guardian of the heirs of Farmer, such possession operated in the law as an *extinguishment* of all liability of Williams upon said notes. This, we think, is made manifest by the following authorities: In 5th Peters Rep. of S. C. U. S., 207, the court say—"The executor cannot sue himself, and for this reason he is authorized to retain his debt out of the assets in his hands. The right of action being once extinguished, cannot be revived, either by the executor or his legal representative. On this point the authorities are decisive; and although some difference of opinion seems to have been entertained as to the extinguishment of the debt, yet it is in effect extinguished, as the legal right to enforce the payment of it is gone."

In the case of Hall *vs.* Hall, 2 McCord Chancery Reports, 304, the court say—that "debts due from the executor to the testator are so much cash in the hands of the executor."

In the case of O'Neal *vs.* Herbert, 1 Dudley's Law and Equity Reports, 31, Chancellor Harper, in delivering the opinion of the court, says—"I suppose that if an administrator have in his hands the balance of an estate, and is afterwards appointed the guardian of infants entitled to it, he will be chargeable as guardian, and will be liable as in the case of Simkins *vs.* Cobb, (2 Bailey Reports, 60.) So, if before his appointment he has received a sum of money belonging to his wards, as in McDowell *vs.* Caldwell, (2 McCord's Chancery Reports, 55.) *Or, if in any other capacity he be indebted to himself as guardian, being unable to sue himself, the debt* shall be presumed to be paid."

In Chief Justice Marshall's Decisions, 267, is the following case: The testator Munford by his will gave a bond on John Bannister to his daughter Francis, and made his brother Robert her testamentary guardian, and his own executor. Robert charged himself as executor with the amount of the bond, and assumed the same to be his undeniable property. Chief Justice Marshall held, that Robert as

executor, with his securities, was not bound; but that Robert was bound as guardian, on the ground that when he chose to consider the bond as money in his hands, (which he had the right to do,) he was instantly chargeable with it as guardian, because it being his duty instantly to pay over to himself as guardian, the law will consider him as having done that which he ought to have done. Now, we urge, that if Hart had the right to consider the bond of "John Bannister" or any one else as cash, and to charge himself with the amount thereof, and assume that it was due to himself individually, surely he had the right to consider the notes of himself and Williams as cash, and to charge himself with the amount thereof.

In the case of Galphin *vs.* McKinney and Breithaupt, (1 McCord, 280,) Brooks as commisisoner in equity was ordered to sell land. He did so and McKinney purchased it and gave his bond with Breithaupt as his security for the purchase money. The money, when collected, was to go to McKinney as the executor of Galphin. McKinney applied to the court to have this bond delivered up to him, and it was done. The Court of Appeals of South Carolina decreed that it was properly delivered up to him, and that Breithaupt, the security, would have had the right to have it delivered up to be cancelled if McKinney had not done so. To change the names of the parties, Arthur Burney was made commissioner to sell lands. He did so, and Hart became the purchaser, and gave his notes with Williams as his security for the purchase money. The money when collected was to go to Hart as guardian of the heirs of Farmer. Therefore Hart had a right to have those notes delivered up to him to be cancelled, and Williams himself would have had that right if Hart had not exercised it.

In the case of Gray *vs.* Brown, 1 Richardson's Law R., 352.—William G. Steel was trustee for Rachael Carroll, who married and died, leaving five children, of all of whom B. R. Carroll was appointed guardian, and defendant Brown signed his guardianship bond as security. Afterwards Carroll, the guardian, was substituted trustee in place of Steel, and on 9th June, 1838, filed a petition for leave to sell the trust property. This leave was granted (see it page 353) on his giving bond with security in double the value of the property, the bond was given (see it on page 353.) The property was then sold, and Carroll received the money for it, being $8200. Carroll did not account for the money, which he thus received as trustee and became insolvent. This suit was brought to recover the amount

from defendant Brown as security on Carroll's guardianship bond. The Court of Appeals held that Brown was bound to pay it, because it was Carroll's duty, as trustee, to pay himself as guardian, and the law presumes he did so. The court further declared that "even entire destitution of means would not seem to arrest the presumption of payment, which by law results from the union of debtor and creditor." The court says further, "The cases which have been cited from our court—Simpkins *vs.* Cobb, 2 Bail., 60. McDowel *vs.* Caldwell, 2 McCord, Ch. 55. Hall *vs.* Hall, 2 McCord, Ch. 304. Joyner *vs.* Cooper, 2 Bail., 199. Schnell *vs.* Schroder, Bail. Eq., 334, and O'Neal *vs.* Herbert, McMull. Eq., 334, *all* seem to regard the extinguishment of the debt as a necessary legal result of this union, 304.

Mr. Thompson for Appellee contends:

I. As to the first error assigned, that Tom Peter Chaires was properly excluded. He was one of the makers, a co-surety with Williams, and liable for contribution, in case of recovery against Williams. He was not competent without a release. 1 Greenleaf on Ev., sec. 390, et seq., 402—Leroy *vs.* Johnson, 2 Peters, S. C. Rep., 187, 194—Bagley *vs.* Osborne, 2 Wendell R., 527—Ransom *vs.* Keys, 9 Cowen R., 128—Carleton *vs.* Whitcher, 5 N. Hamp. R., 196—2 Philips on Ev., 1521, and notes, where all the cases are reviewed, and the ruling of the court sustained.

II. As to the second error assigned, the refusal of the court to permit the witness Lang to give evidence of the declaration of defendant himself in his favor.

The court below did not err in this—the defendant sought to give evidence of what he had himself said to the witness, a third party in relation to these notes, and thus make evidence for himself.

The conversation, too, was at a time subsequent to the institution of the suit.

I do not conceive it necessary to say more on this point.

III. The court did not err in its refusal to instruct the jury, as prayed by the defendant.

1. The first instruction asked for seemed to regard Burney as the owner of the notes, having full property in them: this was in direct opposition to the evidence, which showed that he held them in

his fiduciary capacity as guardian. The first instruction which the court gave states the law correctly according to the facts of the case.

2. The second instruction asked for was, that the delivery, without fraud, by Moseley to Hart of the notes in suit, in consideration of the receipts, operated as a divestiture of all title out of Moseley, and therefore this suit cannot be maintained in his name.

The delivery was made to Hart, in virtue of his letters of guardianship—Moseley being the representative of Burney, the former guardian. If the party here meant that the delivery, without fraud, to Hart extinguished the notes, that will be considered in the argument on the 3d, 4th and 5th instructions hereafter.

If, however, he meant that the notes being assigned by Moseley by delivery operated as such a divestiture of interest and title as would prevent his name being used by a holder to recover the money, it is clearly erroneous, and the court below was right in its refusal.

The notes were payable to Burney, guardian, &c.—they did not contain the words, "or order, or bearer"—the assignee or beneficial owner has a right to use the name of the payee for the purpose of recovery. Eastman *vs.* Wright, 6 Pick., 322. Payne *vs.* Rogers, Doug., 407. Locke *vs.* Taunton, 7 Taunton, 9. Skinner *vs.* Sims, 14 Mass. R., 107. Mosher *vs.* Allen, 16 Mass., 452. Winchester *vs.* Hackley, 2 Cranch, 352. Jarman *vs.* Howard, 3 Marsh, 384. Smock *vs.* Taylor, Coxe, 177.

The death of the assignor does not defeat the assignment, but the assignee may use the name of the executor or administrator of the assignor to recover the money. Dawes *vs.* Bowleston, 9 Mass., 337. Cutts *vs.* Perkins, 12 Mass., 206.

The action, therefore, is well brought in the name of Moseley, administrator, for use, &c.

3. The 3d, 4th, and 5th instructions are the same in substance, and assert the position that Hart, being one of the makers, and acquiring the possession without force or fraud, the notes were extinguished.

It is said that when the right to receive and the duty to pay unite in the same person, the debt is extinguished, but there are exceptions to this rule.

When the right to receive is in *auter droit*. 8 Co. Reps., 136. Needham's case. 1 Salk., 326, Gray *vs.* Acton.

It does not extend to administrators. 4 Bac. Abr., 15, Tit Ex's. 6 Iredell Law Rep., 448.

Nor to guardians: in which case right of suit is not even suspended. Wilborn *vs.* Gorrell, 4 Iredell Eq., 117, 121.

Nor to the case where a woman residuary legatee married the sole executor; her share of the residue being held to survive to her. Baker *vs.* Hall, 12 Vesey, 497. Gray *vs.* Acton, 1 Salk., 326.

Administrator bound to inventory notes, though he is the promissor, and though he denies they are due. Porter vs. Titcomb, 1 Fairfield R., 53. See also, 2 Rich. Rep., 80, Bellume *vs.* Wallace.—And Kent *vs.* Somerville, 7 Gill & Johns, 265.

4. The 6th instruction asked and refused was, that if Hart obtained possession of these notes lawfully he had a perfect right to destroy the same, &c.

He received the notes in his capacity of Guardian, and in virtue of his authority under the letters, &c.

He had no authority as holder to destroy the interests of the real owner. Hill *vs.* Calbert, 1 Rich. Eq. R., 56.

A Guardian is an agent, having an authority not coupled with an interest. Granby *vs.* Amherst, 7 Mass. R. 6. Manson vs. Felton, 13 Pick., 109. 4 Scammon 127, 133.

They are not invested with anything like the same authority that belong to Executors. Per Hitchcock C. J., in Swoope *vs.* Trotter, 4 Porter, 36. See also, Exum *vs.* Bowden, 4 Iredell, 281.

The value of the interest which a Guardian has in the ward's estate, is not the value of the estate, but the office of Guardjan so far as compensation for labor and services extend. Ritchie *vs.* Mauro & Forrest, 2 Peters, 243.

He cannot release a debt, though to make the debtor a witness for the ward. Fraser *vs.* Marsh, 3 Cond. Eng. C. L. Rep., 235.

So his admissions are not evidence against the ward. 3 Cond. Eng. C. L. Rep., 385.

He cannot bind the person or estate of the ward. 6 Mass. R., 58.

due from himself to the debtor, and thus make himself debtor to the principal. Story on Agency, p. 170, sect. 181. Ibid, 439, sect. 430. Paley on Agency, 262.

A factor has authority to sell for money, not to barter: if he barters no property passes. Guereiro *vs.* Peile, 3 Barn. & Ald., 616.

He may not pawn or pledge the goods, and if he does the property in them is not altered. Patterson, *vs.* Tash, 2 Strange, 1178.—Newsom *vs.* Thornson, 6 East, 17. Shepley *vs.* Kymer, 1 M. & S., 484. Everitt & Saltus, 15 Wend., 275. Ibid, 20 Wend., 268.

So also, a party receiving bills to be applied to a specific purpose cannot by applying them to his own use alter that purpose and make the trust a debt. 2 Smith's Leading Cases, 89, 131. See also Woodson *vs.* Payne, 1 Call, 570.

All the parties to the notes had notice of the trust or real ownership. The notes not being payable to Burney, as "Guardian of the heirs of John Farmer, deceased,"—it was notice. Exum & Bowden, 4 Iredell Eq. R., 281. Powell *vs.* Jones, 1 Iredell, 337. Fox *vs.* Alexander, Ibid, 340. Lockhart *vs.* Phillips, Ibid, 342.

Considered as a *Trustee,* he could not alien the trust fund in payment of his own debt. Graff *vs.* Castleman, 5 Rand., 195.

Nor alter the destination of the fund from the purpose for which it was originally intended. Presbyt. Church *vs.* Dounom, 4 Dessau, 154. Hill *vs.* Simson, 7 Vesey, Jr., 152. Dodson *vs.* Simpson, 2. Rand., 294. Rutledge *vs.* Smith, 1 McCord. Ch'y, 119.

5. The court did not err in refusing the 7th instruction asked for by the defendant below.

A receipt is not conclusive evidence: it may be explained or rebutted by parol. 1 Phillips on Ev., 108. Elwell *vs.* Leslie, 2 Halstead, 349.

But these receipts are by Hart, one of the payers of the notes, and to give the receipts the effect contended for is to permit a party to make the evidence of his discharge.

6. The 8th instruction asked for, was on the supposition that the court would charge that the legal title of the notes did not pass to Burney's representative on his death, but the court did charge that Moseley, the representative of Burney, held the notes as Burney had held them in his life time.

7. The 9th instruction asked for, was an abstract question of law

which though right the court may well refuse. Caton *vs.* Lenox, 5 Rand., 31. Hamilton *vs.* Russell, 1 Cranch., 309.

8. The court was right in its refusal to give the tenth instruction. "Current Florida money," means specie, or par money. See Cockrill *vs.* Kilpatrick, 9 Missouri R., 697.

9. The court was right in refusing the 11th instruction asked for. The character in which Moseley sues was not denied by plea, which is necessary if defendant would put it in issue. 1 Chitty Pl., 526. Thyme *vs.* Thyme, 2 M. & S., 553. Worshem *vs.* Goar, 4 Porter, 441. Chaplain *vs.* Tilley, 3 Day, 303. Pollard *vs.* Butler, 3 Blackf. 339. Coxe *vs.* Robertson, 1 Bibb., 604. McKim. *vs.* Riddle, 2 Dallas, 100.

IV. The fourth error assigned is that the court erred in the instructions given.

1. That the first is correct is manifest from the facts which appeared in evidence.

2. The court was right in leaving the fact of payment to the jury. See Garlock *vs.* Geortner, 7 Wend., 198.

3. The third instruction is fully sustained by the argument and authorities in justification of the refusal of the prayer of the defendant.

An action at law may be sustained on the notes, though mutilated by the cutting off the names of T. P. Chaires and R. W. Williams, the same having been done by Hart in fraud of his wards the beneficial owners of the notes. See U. S. States *vs.* Spalding, 2 Mason Rep., 478.

It was a fraud in Hart, and none can gain any interest thereby. 4 Iredell Eq., 219.

V. As to the 5th error assigned, that of the trial on the 23d May, 1846, there is nothing in it.

A court may be continued to a distant day by adjournment. See Mech. Bank vs. Withers, 6 Wheaton, 106.

See also 7 Barn. & Cres., 6—the case of the King *vs.* Leicester, in which it was held that the 51 Geo. III. c. 84 which enacted that the Michaelmas Quarter Sessions shall be holden in the week next after the 11th of October is merely directory, and the sessions may notwithstanding that enactment, be legally holden at another time.

Archer on the same side.

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

Brockenbrough for Appellant, in reply:

I. In this action we must consider the rights of *Moseley, executor,* alone, and if he, in that character, cannot recover, no recovery can be had—the *appendage* of the words, "for the use of Patrick Smith, guardian of the heirs of John Farmer," in no respect alters the rights, claims, or character of the plaintiff—with them the defendant has nothing to do. He can traverse nothing and take no issue, with or about Smith; the words only regulate rights between Moseley and Smith, and cannot increase Moseley's rights against defendant.

By suing in this mode, Smith admits he has no right of action *in his own name, in this case,* and if Moseley has none, they cannot recover together, when neither could separately. Even if Smith could separately, it will not avail him *here,* unless Moseley, Admr. can, because *he* sues.

Mr. Thompson's doctrines in his printed brief, "that the assignee or *beneficial* owner, has a right to use the name of the payee, for the purpose of recovery, and that the death of the assignor will not defeat it, and even that the assignor cannot dismiss, &c.," *is not denied.* But *the application* is denied.—

1. Because the doctrine and authorities apply only to releases, discharges and equities, between assignor and defendants, *arising subsequent to assignment,* or notice thereof. And here all our defences *vs.* Moseley existed long *anterior* to any possible interest in P. Smith.

2. P. Smith never had any assignment whatever from any one.

3. Smith is not the *"beneficial owner"* of these notes if existing—but his *several wards*—who have several interests, and several rights—and must proceed *severally* in any action that they bring *at law.* —Burnett *vs.* Commonwealth. 4 J. J. Marshall, 389. 7 Pick. 88.

4. If the notes existed, and the law assigned them to Smith, the law made the same assignment before to Hart; and if so, the *legal* title has never been in Moseley, and he cannot now sue. If the words "guardian" imply a severance of the funds from Burney's own funds, as "administrator" is held to do—and upon the authorities cited—it would then have to be admitted that there can be a *guardian* in the nature of a *guardian de bonis non,* to whom the notes would go, as to an administrator de bonis non, in the case supposed. It then follows that the 2d or 3d guardian, (*de bonis non!*) must have the legal title, and sue in his own name, (for by this doctrine Moseley never could sue, as no estate would come to him.)

Administrators de bonis non do not sue in the name of the executor of the first administrator.

This doctrine is inconsistent with the doctrine of assignment from Moseley, and with this suit. If on Burney's death the paper goes to Hart, and thence to Smith, as the ward's estate, nothing goes to Moseley.

II. The question then is not, what could the heirs of Farmer do? or what could Patrick Smith do? As they are not parties to the record, and the *heirs* certainly no more bound by the acts of Smith than by those of Burney or Hart—and Moseley and Smith combined can do more than Moseley and Hare combined. The question is, can *Moseley recover?*

1. *The legal title passed to Moseley—or it did not.*

1. If Moseley can sue now, some legal right must have passed to him on Burney's death. *There is no intermediate state—a man must have the legal* right entirely, *or not at all.* In Mr. Thompson's cases, the words "Administrator, &c.," passed over the whole estate to Administrator de bonis non, and left none in Executor of first Administrator. So on Mr. Archer's supposition, that title passes to successive guardians by act of law in virtue of their appointment.—The whole *title passes*, if he is correct, or none at all—and unfortunately for Moseley's title to sue, the whole title would pass, not to the guardians, but still further off *to the wards,* for the *land was theirs* —as in the cases he supposes, of bond to the Governor and his successors. He says no title could pass to his Executor or Administrator—conceded. But then Moseley cannot sue. See case cited by Mr. Thompson, 8 Eng. C. L., 45, Catherwood *vs.* Chabaud. The administrator de bonis non took the *title,* and sued in his own name. See also 1 Salkeld, 306. *The title passed directly.*

2. If this action is sustainable, then Moseley must have taken the whole legal right in these notes when Burney died. If a right to sue existed, he then had a right to receive payment on them, and charging his account as Executor with the money, to credit the Testator's guardian's account. This was the only thing he could honestly do with the money when he received it. This he did.—When Hart was appointed guardian, Moseley renders *an account,* crediting Hart as guardian, and debeting himself as Executor.—Hart's receipt paid the debt due from him to the guardian, and also the debt due from him as Executor—and being filed, releases him as Executor —releases Burney as guardian—and on his bond to sell

land. It also charges Hart and his sureties with *cash as guardian*. All these things he had a right to do, and it was his duty to do. The payment of notes over to Hart, and his receipt might have left open for a long term of years, dangerous question of liability of his Testator and himself. He closed all questions. He made his election. The law was with him. Alston, *vs.* Munford, 1 Brockenbrough, 278, and note and cases cited, viz: Taylor *vs.* Deblois, 4 Mason, 131. Pratt, &c. *vs.* Northan, &c., 5 Mason, 108. Myers *vs.* Wade, 6 Rand., 444. To which cases special attention is invited.

These things we contend Moseley had a right to do—if he had not, he is *estopped* from disputing his right *vs.* Hart—a *fortiori vs.* Williams. See Lord Denman's beautiful rule as to estoppels *in pais* in the case of Pickard and Sears, 6 Adolphus and Ellis, 475—cited and approved and adopted by this court in Cotten *vs.* Williams, 1 Branch, 34. 5 Arkansas, 568. Cheever *vs.* Smith, 15 Jo., 276. Bacon *vs.* Chesney, 2 Eng. C. L., 352. Parsons *vs.* Administrators of Gaylord, 3 Johnson, 464. Coxe *vs.* Williams, 4 Cond. La. R., 249. "A positive right conferred by law on the doing of a certain act, cannot be destroyed by *speculations* as to what would have been the situation of parties, if that act had not been done." Nolte et al. *vs.* Their Creditors, 4 Cond. Lou'a. Reps., 136. 1 McCord, 298, Galpin *vs.* McKinney, et al., a great case upon the whole subject, the equity of which has not been and cannot be impeached.

This case, and Gray *vs.* Brown, 1 Richardson, 364, (and the many cases there cited,) and the principle of extinguishment in all fully sustained, are not in the least overruled, or even the doctrine approached in Bellune *vs.* Wallace, 2 Richardson, 81. In that case there was no question of extinguishment whatever. The two guardians bonds were held to be entirely cumulative, and therefore the last bond did not discharge the first, and therefore the mortgage given to secure the surety in the first bond, was not discharged by giving the last. And the real question in the case was whether the mortgagee (his mortgage being thus held good,) could bring an action of trover for a slave against a purchaser under judgment against the mortgagee, before he, the surety, had actually paid money on account of his suretyship, and been therefore damnified. And it was held he might. Because the mortgage passed a present estate, and performance of the condition must be shown to defeat. There was no question of extinguishment. Wardlaw, dissenting, still con-

tends that the whole doctrine of extinguishment is in full force.—He dissents only on the main question—whether trover would lie, until the party had actually been damnified by payment.

He admits the continuance of the mortgage, by saying "the proceedings were probably such as saved to the plaintiff in his securityship to the second bond, all the securities he had taken when he signed the first bond." And he goes on to say, "BUT IF" the guardianship had been revoked and a new appointment made to the same man, he would have been held to have paid over the assets to himself under the new appointment, and in discharge of his first sureties, under the authority (which he cites) of Gray *vs.* Brown, and cases there cited as the admitted law. And which position, so far from being overruled or doubted, is not even alluded to by the court in its decision.

The hypothetical citation of a well established principle, (in a case in which it is admitted it does not apply,) in a dissenting opinion, on a wholly different question, is cited to show that the court, which does not allude to the subject, intends to overrule a whole series of well considered and established cases, which had been before cited and approved as the law by the same court, in the same year, (1845)—the first being in January, the latter in December.—And when *Wardlaw, O'Neal, Butler,* and *Frost,* decided the first cause, and only Evans dissented. And *Evans, O'Neal, Butler,* and *Frost,* decided the last case, and Wardlaw and Richardson dissented on another point, citing the former case as established law. Can O'Neal, Butler and Frost, be held to have changed their minds, and overruled so many cases, so lately approved, without a *word upon the subject,* and in a case in which it is admitted the question did not arise? No one could be more surprised than those Judges would be at the citation of the last decision as overruling the whole series preceding. Certainly Bellune *vs.* Wallace might as well be cited as overruling any other series of cases.

To return to Estoppels:

See also Doe-demise of R. V. vs. Oliver & Duchess of Kingston's case, 2 Smith's leading cases, 439, [30 Law Lib. 105.] Estoppels must be mutual. Hart and his sureties on his guardian bond, and Hart's adm'r would be estopped by Hart's receipt. Even his wards themselves would be estopped by it conclusively.—*Thompson's Digest,* 201, 36.

If the Farmers sued Moseley for these notes specifically, he might

reply that they were paid to him. And it must be a good reply, if he can sue on them. And if sued for the money, he can reply this receipt. The receipt being *conclusive* between him and the wards, *a fortiori* must it be conclusive between him and any subsequent guardian. And if conclusive *for* him, it must be *against him*.—Certainly *when* suing in the same right. Nor is it evidence made by Hart for himself, as Mr. T. contends. Moseley wrote it—dictated—executed it. Moseley made out the account and rendered it—He accepted it—He filed it—He has relied upon it. It is the sheet-anchor of safety to himself and Burney's Estate.

4. The Record shows that Moseley is no longer held bound in the Probate Office—but Hart. There is a judgment there approving Hart's loose memorandum, so far as it charges himself. The account is "examined, approved, and allowed." This is *res judicata* —The decision of a court of competent jurisdiction unreversed.—It discharges Moseley as Executor, Burney as guardian, and on his land selling bond he charges Hart as guardian and discharges him and sureties as an individual.—See Steele guardian *vs.* Glass—1 Kelly, 488.

The recovery in this action by Moseley could not *undo* all this. If he recovers he holds as his own. He cannot by recovery make the discharged parties again responsible. By not paying over the money he would commit no devastavit. If insolvent, Williams would lose it.

III. The notes were *extinguished* before they came to *Hart's hands*. They never came to his hands *as guardian*. He and Moseley are both estopped from saying they did. When Moseley *calculated the interest then due*, and charged up principal and interest in an account rendered—he admitted them paid, and that he only then held them as a *voucher* for correctness of his entry, and when he consummated his act by taking the receipt, or one new voucher for the whole account, he had no longer a right to hold it in any shape. It then became Hart's voucher for the payment for land, and as such he must have received it. Except as such he had no right to receive it.—Hart could not then attempt to set up the extinguished note in his own hands, without fraud.

1. Upon his own securities in the note, who had been discharged.

2. Upon his wards, for whom he had received so much cash, the principal and interest on which combined sum he and his bondmen

were liable for interest annually, until they came of age. Thompson's Dig., 207.

If the note had come to his hands and been thereby extinguished, he would have been responsible for the amount as guardian, as by his actual arrangement with Moseley; but if as opposing counsel contend, the right of action would have been suspended pending his guardianship, then by attempting to set up this note, when so passed to him by Moseley, he would have committed a further fraud upon his wards, by releasing his sureties on the guardian's bond, (made responsible by his receipt to Moseley)—*and if he could have validly set it up* against Chaires and Williams, he would be holding for a long term of years at *simple interest* his *own uncollected paper*, with all the hazards of death and insolvency in Chaires and Williams, and the certain *operation of the statute of limitations* in a short time, instead of being responsible for cash received on his bond and security as guardian, and compound interest, annually, and immediate liability at all times to a call for new security, or to *disgorge*.—Thompson's Digest, 225, sec. 2.

For these reasons, Moseley and Hart's conduct was most beneficial to the wards. It was best calculated to secure their interests. It was such a course as any man would wish pursued in his own affairs. It was the most favorable arrangement which could be made.

Fields *vs.* Schieffelin, 7 Jo. Cha. 150, [powers and duties of guardians, and nature of their estate fully examined and decided upon.]

We have yet to hear of any disaster. No *devastavit* is shown. The money is yet in Hart's hands, and no evidence of even a call upon him, or his administrators or sureties. The receipt of the money by a guardian is no *devastavit*. It is the very thing he was appointed to do. It is only non-payment when required that shows impropriety. See Bryant, guardian, &c., *vs.* Owen and wife, 1 Kelly, 374—doctrine at large, and confirmed in a subsequent case same volume. The record does not show that they have not collected it. They may be suing now. They might yet sue, and recovery in *this action* would not be a bar, even when paid. When Hart received the note, it would have been a fraud to attempt to set it up. The only honest course was to cancel actually, that which was already legally discharged.

IV.—1. But Williams is only a surety. His obligations are *stric-*

tissimi juris. He had a right to pay the notes at the moment due, and sue Hart. Could *Moseley,* after the receipt, have accepted payment? And if he had, could Wiliams, on Moseley's receipt, have recovered from Hart, who had already discharged the note by irrevocably rendering himself responsible as guardian to his wards? If so, Moseley could, by his acts, lawfully put Hart, without his consent, in a situation to be forced by law to pay the same debt twice.

2. Moseley then calculated all the interest then due, and charged himself with it, and was discharged by Hart. Can he now, after Hart's death, make Hart's surety pay him, not only that interest, but all that has since run upon the note, if unextinguished?

3. Hart is dead. If Wiliams pays, his remedy is against Hart's administrator. But his administrator is strictly bound by his acts. He is estopped from denying that Hart charged himself as guardian. He cannot set up that Hart acted fraudulently or wrongfully in cancelling the notes. Hart's administrator is irrevocably bound to the wards, if they sue for the money. If now in court, against Hart's administrator or heirs, could any defence be made to them? And if Williams at the same time claimed on account of a payment to Moseley, the court must decide in favor of the liability to the Farmers, and Williams must lose his debt, by Moseley's act, or he is now released.

Williams has, on the same principles, lost his right of contribution against Tom Peter Chaires. As to joint and several liabilities, see Cheetham *vs.* Ward, 1 Bos. and Pul., 633. Nicholson *vs.* Revel, 4 Adol. and Ellis, 675. Cited and approved, 4 Meeson and Welby, 465.

As to sureties rights in general, and duty of obligees—Samuel *vs.* Howarth, 3 Merivale, 272. Nisbet *vs.* Smith, 2 Bro. C. C., 579. Rees *vs.* Benington, 2 Vesey, Jr., 510, and notes. Exall *vs.* Partridge, 8 Term R., 308. Bowmaker *vs.* Moore, 7 Price, 234, (3 Eng. Excheq. 38.) Combe *vs.* Wolfe, 8 Bing., 156.

As to alteration—3 Maddock, 120, 221. 15 Eng. C. Law, 44 and 514. Master *vs.* Miller, in Smith's Leading Cases, vol. 1, 599, American notes.

V.—1. Moseley having acted in *auter droit* in his settlement with Hart, and now suing on *the same right,* is as much estopped by his own acts, as if acting in his individual capacity in both cases. He

can no more be allowed to do that which would be a fraud upon parties, than he would if acting in both cases for himself.

2. If A. holds B.'s note, and renders him an account, in which the interest on the note is calculated, and the whole interest and principal is added up with other items, and placed to A.'s credit, and B.'s debit on another account, and A. takes B.'s receipt and discharge on the account rendered, and uses it to discharge himself as so much cash on the last account, and gives B. the note which B. cancels, and after B.'s death the cancelled note comes by any accident into A.'s hands, and he sues and recovers the money from B.'s surety, it is a fraud upon B.'s representatives and on his surety.

3. It is not less a fraud, if he does it as executor.

4. Patrick Smith cannot against his will use his name, and make him do that which it would be a fraud for him to do himself.

VI. Moseley can have no greater rights certainly against Hart's surety, than he could against Hart, if now alive, or when he was alive. When Hart was alive, Moseley had not possession, or right of possession, of the note, and certainly no right of action, when it would have been a fraud to recover. Then what sort of a *legal title* had he in the note? And when and how did he get back his right of action?

If Hart's death could by possibility have carried forward a right to sue on an extinguished note—to Smith, or the Farmer's—it could not carry *it back to Moseley as executor.*

VII. Nothing can better exemplify the true merits of the case than the admission, "that if Hart had actually paid the cash, the whole matter would have been proper, and no action sustained, though Moseley had at once paid it back."

The law never compelled parties to do so vain an act. It would be strange, indeed, if all the rights of all the parties depended upon so idle a ceremony, ending in the same receipts, cancellations, debits, credits, discharges, rights, duties, and obligations, precisely as we contend they now exist. *Common sense* has been appealed to as authority. May we not invoke it here, and *common usage* also?—When two men owe a debt to each other, though in different rights, do they always pay the money, and then pay it back again, or pass receipt and papers? Would not so idle and unusual a ceremony raise a suspicion that some fraud, or cloak for perjury was intended?

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

BALTZELL, Justice:

This case has been twice argued with a zeal and ability proportionate to its importance and the interest felt by the parties in its decision.

It has received from the court the consideration due to the questions involved and the great principles at stake, and though regretting a difference of opinion amongst the Justices, yet they proceed to give the results to which they have arrived.

A tract of land of 400 acres, belonging to the heirs of John Farmer, was sold at public auction on the 1st of January, 1841, and William W. Hart having become the purchaser executed his five notes with the defendant and Tom Peter Chaires as securities for the purchase money, payable in annual instalments of $960 each on the first days of January '41, '42, '43, '44, and '45. The notes were payable to Arthur Burney guardian of the heirs, and the sale was made under the order of the County Court of Leon County, upon the representation of the guardian that the interest of the heirs would be greatly promoted by the sale, that the lands were renting for only $100, whereas they were worth 10 or 12 dollars per acre, and the legal interest on what they would sell for would be equal to $400.

Burney died and Hart in December, 1842, was appointed guardian. Hart died about March, 1843, and Patrick Smith, who has instituted this suit in the name of Moseley executor of Burney, was appointed guardian in his stead. The counsel of both sides agree that the legal title in the notes was in Burney in his life time, and after his death in Moseley. Defendant's counsel support their position in this respect by reference to Chitty on Bills, 160, 358. "In the case of a bill payable to A. or order for the use of B., payment should be made to A. or his indorsee, and not to B." Other authorities are also cited by them to the same effect. Story on Notes 130, 461, 130. To strengthen his case, plaintiff availing himself of a provision in the rules of the late Court of Appeals "that suits may be brought by a plaintiff for the use of another person named in the process of pleadings," has connected the beneficiary or equitable with the legal interest on the notes. So that there would seem to be no real difficulty as to the form of the action.

The general issue was filed in the case, and various positions are assumed in defence, mostly arising from the fact that the names of

defendant and his co-surety were cut off from the notes, whilst in possession of Hart as guardian. Before noticing these, it is proper to advert to grounds not taken in argument either in this court or in the court below, but which have been regarded as worthy of attention by the justices dissenting from the decision of the case. The first of these is, that Patrick Smith is not in fact guardian of all the heirs of John Farmer, but of a part only. Objections of this kind are not in general favored—if made to the person of the plaintiff they should be presented in proper time so as not to surprise—usually by plea in abatement, and the issue thus formed is first tried and disposed of. A plea in bar waives objections that could be presented in abatement, and especially admits the character in which the suit is brought. Archb. Pl. and Ev., 283, 167. 2 Phil. Ev., 447. 3 Ibid, notes, 331. 1 McCord, 468, 470. 15 John., 228.—1 Bibb., 604.

Other objections are also taken, such as that the sale was not made in conformity with the order of the court, and the notes taken differently from its directions. These questions are not presented by the pleadings, and the appropriate time to decide them is when they shall be properly raised or adjudication. If the objections exist there should have been a plea alleging the failure of consideration; but there is none such in the record, nor is it pretended that Hart was disturbed in the possession of the land or that his title under his purchase has ever been questioned; indeed we see defendants have taken a mortgage of it for their indemnity. We therefore decline to notice these points. If requisite it might not be difficult to dispose of them satisfactorily and conclusively.

The main reliance of the defence is on the position that the receipt given by Hart to Moseley paid the notes and satisfied them.—It is admitted that Moseley is discharged by the receipt so far as Farmer's heirs are concerned. The question is as to its effect upon Hart, and it is only necessary to refer to the transaction to ascertain its true character. Moseley held the notes as executor of Burney; but they belonged not to the estate he represented, but to the heirs of Farmer, and Hart being their guardian was entitled to them. Moseley delivered them, and takes the receipt for his own protection. The transaction concluded, Hart obtained the notes, Moseley Hart's receipt. Hart got the notes not because he was maker and through a payment to Moseley; (for it is not pretended that money or consideration of any kind passed) but as guardian. It is difficult to

see how Hart can claim under the receipt, it was Moseley's not his. So far from Hart deriving an interest by the receipt, it is on the contrary evidence of Moseley's having derived an interest from him. So far from relieving him from responsibility it creates a duty, and involves accountability upon him. To make the receipt a payment to Moseley, is to make Moseley debtor to Farmer's heirs, thus destroying the entire legal effect of the receipt, and the design of the parties in executing it. Such an idea was never entertained by the parties at the time of the transaction nor afterwards, and is not in our opinion the fair import of the agreement which is to be taken or considered in reference to all its parts. Hart retained the notes as they were received from Moseley until his death—returned them in his guardian account as the notes of his wards, distinct from cash—retained his own name in the notes, whilst he cut off, or permitted the names of his securities to be cut off, showing that he did not consider them as paid. The Judge of Probate too charged the notes to him separate from cash. But the relation which the two parties Moseley and Hart occupied to the subject we think is conclusive, if anything were wanting. They were co-trustees to the infant heirs of Farmer, Moseley having the naked legal title while on Hart was imposed the duty as guardian of taking charge of the notes, and the money obtained from them until his wards came of age. A receipt by one to the other on parting with their possession would have the effect merely to devolve on the party receiving the peculiar duty and responsibility of collecting them as in the case from Chitty, of a note given by A. to B. for the use of C. C. gets the note from B. and gives a receipt for it, this is no discharge of A. The only effect is to relieve B. of the responsibility, if there be one, of collecting the note. Hart, however, through means of the receipt obtained possession of the papers, and the true question is not whether the receipt constituted a discharge, but whether through this possession, thus uniting the two characters of maker of the notes and guardian, there was in law an extinguishment of the debt.

That in case of an executor indebted to his testator such a result would follow is very fully settled, though we shall find that the grounds upon which it has been permitted to operate are various and conflicting both in this country and in England. The probability is that it is a consequence of the enlarged interest in the estate of the testator allowed by the law at a very early period to the executor already referred to by this court in the case of Colquitt *vs.* Faunt-

leroy. In the leading case on this subject, that of Wankford reported in Salkeld, we find a difference between two very eminent judges Lord Holt and Justice Powell, the latter remarking "some books say the action is gone, some say the debt is gone, and some say *the debt remains*, they will all be reconciled by this, that the debt will be assets," that it was by way of legacy or gift of the debt, and not by release, &c. The Chief Justice said, "as the person entitled to receive it is also the person that is to pay it, that amounts to an extinguishment." Salk., 303.

In Masachusetts the court say, "It is not always a legacy nor a release nor extinguishment of the debt. It is more correct to say that although the duty remains, the right of action is discharged because the executor can't sue himself." Shephens *vs.* Gaylord, 11 Mass., 269. In New York it is considered in " the nature of a specific bequest of the debt not to be paid unless there are assets sufficient to pay the debt." Marvin *vs.* Stone, 2 Cow., 781.

Notwithstanding the rule we shall find that an executor could be sued by a creditor of the estate at law always, and charged with his debt as assets. Will. on Executors, 937, 945. Freshly *vs.* Fox, 9 B. & C., 130.

So also will be charged in equity at the suit of a legatee, distributee or next of kin. Toller, 274. 2 Cowen, 781. 3 Brown Cry., 111. 3 Ibid Par. Ca., 607. 11 Vesey, 90. 13 Ibid, 262.

By statute the rule has been abrogated with us both at law and in equity as early as 1834. Duval, 188. It never was applicable to an administrator in reference to whom it is said "the appointment being by the mere act of the law, and a temporary privation of the remedy only the debt is not extinguished—the action merely is suspended during his administration; but revives after it ceases."—Toller Ex., 349. Will. Ex., 937, 946. 2 Black., 512. 1 Salk., 306. Story notes, 543.

1 Siderfin, 79, was the case of an obligor appointed administrator who had died, and his executor was sued for the debt by an administrator de bonis non, of the first intestate and a recovery was had. 8 Co., 136. Keble, 313.

No authority has been cited showing the application of the doctrine to guardians, and we have been unable to find such ourselves. If applicable it must be by some analogy to the office of executor, and we propose to enquire whether any such exists. The civil law is more full and clear as to this relation than ours, and we propose to

refer to it in connection with this subject commended as it is by those two eminent jurists the late Judge Story and Chancellor Kent. "It is equally a provision of religion as of law that those who are deprived of their father during their minority should be put under the conduct of some one who will fill the place of a father as far as possible, and be charged with their education, and the care of their property, who is termed a guardian." Domat, 171.

"His power and authority extends to all that can be necessary for the faithful management of the affairs of the ward—he is esteemed acting for his ward *when he rightly manages the estate, not when he wastes and destroys it.*" Ibid, 171.

"He cannot give away the goods of his ward nor surrender any right he has, nor even diminish it, nor impose on the estate new burdens, nor can he impair, nor render worse the condition of his ward—he has no power but to *preserve the property* of his ward not to injure or destroy it." Ibid, 176.

The same principles are maintained and asserted by the common law. "The authority of the guardian extends only to such things as may be for the benefit and advantage of the infant whereof he may give an account." Bac. Ab. Guard, 684. Co. Litt., 89, a. 7 John., 557.

He can do no act to the injury of the ward. 10 John., 441.

"The court will not suffer an infant to be prejudiced by the laches of his guardian." 1 Black., 463, n. 11.

"When it can pronounce a contract to be to the prejudice of the infant, it is void." Maule & Sel., 482. 2 Hen. Black. 511. 2 Mason, 82.

He cannot set aside an award favorable to his ward. 4 Bibb, 437.

In law he is the mere *bailiff or servant* to the infant, and liable to account which an administrator or executor was not subject to except by statute. 2 Bacon's Ab., 687. 1 Black., 643. 1 Com. Dig., a. 2.

Now account lies not for wrong or waste, but only for money paid. 1 Com. Dig., a. c., 192.

As servant or agent he can only discharge on receipt of the money due. Story's Agency, 170, 437. Paley, 262.

He cannot release a debt even to make a debtor witness for his ward. 3 Cond. Eng. Chy., 235.

His powers and duty seem to bear a very near, if not complete resemblance to those of an administrator *de minore aetate* who "may

pay debts of the estate—sell and dispose of the goods if perishable, retain for his own debt—receive debts due to the testator, and discharge and acquit them on payment. But he is only in nature of a bailiff, and ought to account to the executors—has no authority to transfer the property by sale except in case of necessity nor to release a debt without actually receiving it." Toller Ex., 405-6. 1 Com. Dig., ad. F., 1.

There is no power here to give receipts without payment nor discharges without satisfaction—the power obviously results from the duty, and extends not beyond it; it is to guard, protect, and save the goods and property of the ward during his infancy, and turn them over when he comes of age. The moment the guardian attempts wrong or injury the law intervenes to prevent it by declaring his impotency, and the nullity of the act. Especially we have seen that there can be no bequest, gift or other circumstance in the case of a guardian as in that of an executor to create an extinguishment of the debt. Nor is it by any means clear that if the note were discharged by extinguishment as to Hart, the other makers, the defendant and Chaires, would be exonerated by it. "A discharge of one joint maker of a note by mere operation of law, and without any act done by the creditor will not discharge the other maker." 13 Mass., 148. Story's Prom. N., 502.

Again "Extinction of the debt as to the principal, in general discharges securities, except when it arises from causes such as bankruptcy, which originate with the law and not in the voluntary acts of the creditor." Theobold, 73. Brown *vs.* Carr, 7 Bing. 508. 2 Russ. 600. Other cases relied upon "as precisely in point," are to the effect that "because a guardian could not sue himself, it, the debt, shall be presumed to be paid, and he and his securities on the guardian bond shall be liable." Dudley's S. Carolina Reports.

Literally construed, this authority asserts that if A., indebted to an infant, be appointed his guardian, the debt is presumed to be paid (that is, discharged and settled,) and this is the construction contended for by defendants' counsel. Now it is obvious that if this be true there is no liability on the part of any one; and the principle asserted by the court is directly at variance with their adjudication. But we do not so understand it, nor the numerous cases to be found in the American courts on this subject. In none of them was the question raised as to the liability of the original debtor, whether sued upon the debt in its original shape, or upon the guardian or adminis-

tration bond. Can it pretended that to a suit instituted for the recovery of this debt the party could invoke the presumption of payment through his appointment as guardian or administrator as a means to defeat the suit against him? We think not. The question in the cases alluded to was, whether such indebtedness of the guardian or administrator of themselves, were sufficient to make the securities liable, and such liability was asserted on the ground that as an officer he must be presumed to have discharged his duty; and their liability was the result of such presumption. But it is difficult to perceive how a rule of law whose obvious effect is to enlarge and extend a liability, indeed to give new names and further security, can be invoked to impair, defeat and destroy one already in existence. To discharge the principal under such circumstances would be to overthrow the cases referred to: for obviously without an obligation on the part of the principal there can exist none against the security; it would be to set up the doctrine of extinguishment as to administrators and guardians which we have seen uniformly denied from the commencement as to the former, and opposed to every principal and analogy as to the latter.

A class of cases invoked by defendant maintains that where an executor or administrator is also guardian, the responsibility is devolved by operation of law from the securities of the one to those of the other. These go upon a like presumption that the officer has discharged his duty, and that neither he nor his securities on his official bond can excuse themselves from responsibility by alleging a failure of duty. But upon another ground it is clear to our minds. An administrator or executor is the agent or trustee for creditors, legatees and distributees; so soon as he becomes guardian for a minor having money in his own hands, his joint agency ceases as to this by operation of law; he then holds the money as the individual agent of one instead of all his former *cestui que trusts*. If he gives bond as guardian, his securities become liable for this separate agency, displacing by necessity his former joint action and the responsibility connected with it.

A further illustration may serve to explain: A. is agent for several individuals connected in business; they dissolve and he is made agent by one of those having a large amount of money in his hands derived from the old association; his employment and possession of the money continue under his new relation. It is very obvious that this separate and individual agency supercedes and displa-

ces the former joint agency and responsibility, thereby creating new liabilities. If a new bond were given, the relation of the securities under the new and old arrangement would necessarily be altered; and such we apprehend is the case with the offices of guardian and administrator. But any way considered we do not see that the law of these cases is applicable to the case of this defendant. Hart was never executor or administrator of Farmer's estate so as to transfer a responsibility from the securities on an administration bond to those on his guardian bond.

It is a mistake, too, we think, to suppose that the securities on these notes occupy a more favorable position than the securities on the guardian bond. In establishing the liability of the latter, it by no means follows that the former are discharged. In the case of Fox *vs.* Alexander, decided by the Supreme Court of N. Carolina, the guardian had traded a note of the ward's in payment of his individual debt. The ward coming of age recovered the amount of his debt against the securities on his guardian bond; the latter filed their bill, alleging the insolvency of their principal, and praying that the payers of the notes be compelled to pay them in preference to the person to whom the note had been traded; the court say, they (the securities on the guardian bond) have a right in a Court of Equity to stand in the place of the ward and follow the trust fund and recover satisfaction to that amount now in the hands of the defendant or in the master's office." 1 Iredell, 341.

To the same effect is Powell *vs.* Jones in the same court. Ib. 337.

Reliance is placed on the 40th section of the act of the Legislature, Duval, p. 178. But to bring the case within that provision there must be "a discharge given by an executor, administrator or guardian, of a debt, &c., belonging to a minor." Now we know of no discharge given by Hart to Williams and Chaires except the cutting off their names can be regarded in that light. But the design of the law must be construed to mean not an act of waste or spoilation, but of lawful and rightful discharge. It would be a forced and most violent construction to suppose that the Legislature designed to make an act such as we have been considering, a discharge binding upon a minor and orphan.

Another position is, that "the notes were in fact and in law cancelled and discharged as soon as Williams' and Chaires' names were cut off by Hart, and this, if it were done even through fraud." If a guardian cannot make a contract to the prejudice of his ward,

he cannot without payment legally destroy one already made. There is no where within our knowledge a law written or unwritten, a rule or principle of any court professing to administer justice, which permits the improper mutilation or defacing by an officer, of the evidences of title or of debt entrusted to his charge. So far from it, there are prohibitions of every various character, civil as well as criminal, against such profanation. We could not well give our sanction to a doctrine more mischievous in its results or more disastrous to the peace, the morals, and the dearest interests of society. If a guardian may discharge a debt due to his ward by tearing or cutting up the note of his ward, and more particularly discharge a debt of his own by such expedient, why may not all other officers having a trust and charge protect themselves after this fashion, and pay their debts also—and with less criminality on their part, representing as they do the interests of those able to protect themselves; whilst guardians have the weak and the helpless children alone confided to their charge. But if this doctrine is to prevail, what is to prevent its extension to deeds, judgments, bills of sale, and the records of the Courts? Why may not mutilation pay debts evidenced in this manner as well as notes to a guardian, and thus riot and spoil become the order of the day?

But the law is not subject to such reproach. "The principle is well settled," says the late Justice Story, "that the obligor shall never take advantage of his own wrong, and that his own deed fraudulently or innocently destroyed by himself without payments, does not thereby lose its legal obligation; and the principle applies still more strongly where there are sureties." 1 Gallison, 74. 2 Mason, 2. Olcott *vs.* Rathbone, 5 Wendell, 492. Mitchell *vs.* Cotten, decided at this Term. Equally clear is the doctrine in cases of notes and bills of exchange. Chitty on Bills, 143. Bailey, 358.

Turning to the facts of the case we find no ground for indulgence favorable to the case of the defendant, or to the action of the guardian. These notes were evidently designed by the County Court, under whose orders and by whose direction they were taken, as a permanent investment in lieu of the land of the minors; they were payable after the long interval of five years, and from all that appears in the record were well secured; there seems to have been no necessity for their collection or a change into other notes, with a view to different security. They might have remained with the guardian unaltered, and his duty was not to change them. If a

change had been indeed made in good faith with a view to better security, or even if the securities had paid such as were due, or the guardian having the money in hand for the purpose of payment had returned it in his account to his debit as cash received, there might be a color in the position that the securities were discharged.

But to hold it so, under the circumstances of the case would be to declare a discharge because Hart got possession of the notes as guardian, or gave a receipt to procure their possession from one having their temporary charge or custody, or because somebody else may be responsible for their payment. Such is not our opinion. We hold them to be contracts preserved from injury and maintained in force by a fundamental law prevailing at the time of their execution, acknowledged as well by the Constitution of the United States as by this State and every State in the American Union, operating against every action of the legislature or any other power to weaken or impair them.

The case of Dickerson *vs.* Lockyer, decided by Lord Loughborough bears a near resemblance to the case under consideration, and we have thought it worthy of particular notice. It was a suit brought by an administrator de bonis non, to recover from one of three obligors on a bond which had been delivered up to him and cancelled. The defence was that Lockyer, the general devisee of the estate of Furze (the original obligee) in trust for the widow and children, (with whom the bonds were left by the executrix) had settled and discharged them. They were due by himself and two others as partners, and on a settlement between him and his partners he delivered them up. The defendant contended that but for this arrangement he would have retained assets from the firm—that Lockyer being the agent of the widow and being in possession of the bonds, he was the only person to whom the money could be paid, and that the delivery of the bonds by the executrix to him amounted to an assignment. The court after saying he was not executor but trustee, and that Bener had notice of the trust say: *"they took the seal off the bond, but this is not payment*—then what is the consideration? *there is none as to the estate of Furz, but it is a personal consideration to the trustee. This would not do as a payment at law.* The question in this court is whether the trustee of a bond can without the *cestui que trust* release the obligor. This is a very particular case for he is debtor with the two others. *They cannot by management amongst themselves destroy that security. There was no real payment of the*

money into the hands of Lockyer as money belonging to the estate of Furze to be laid out according to the will. Three co-obligors in a bond by a transaction between themselves, agree that one shall be discharged and the whole security rest upon the two without the privity of the executor."

It is not necessary to enquire what would have been the case if actual payment had been made, and the money was in the hands of Lockyer, &c., &c. The defendant was declared liable although the court said it was a very hard case, they all meant well, &c., and excused them from costs. 4 Vesey, 40.

Another objection is that Chaires, a co-security was excluded as a witness. But we are of opinion there is no error in this. 1 Greenleaf, 440. 2 Phil. on Ev. 1521, notes.

It is next contended that, as these notes are payable *"in current Florida money"* the value of Florida money only should be recovered, by which is meant that a depreciation should be allowed. To solve this question presents the enquiry as to the legal signification of the terms "current Florida money." Do the words "current in Florida" qualify the word "money" so as to change its meaning? We think not. The legal signfication is certainly not as contended for. If it be insisted that the popular acceptation is to govern, and not the legal, it would be difficult to establish even then we apprehend that current money means differently or otherwise than that the bank notes or specie shall be current and pass for what they purport to be worth. If depreciated they cease to be *"current"* wherever the depreciation exists. When this takes place, though the note may be the subject of barter as unsound goods or bad merchandize, it ceases to be money. No longer "a standard by which to measure the value of other things," it is itself subject to measurement to ascertain its own value.

The Court of Appeals of Kentucky, where this subject was discussed and considered with great care under circumstances greatly resembling ours, decided that the terms "current money of Kentucky" mean that kind of money made current by the act of Congress which is the only current money of Kentucky. The same Court in Bainbridge *vs.* Owen interpret "current money to mean constitutional coin." 2 J. J. Marshal, 463.

The Supreme Court of Missouri say, "gold and silver coin by the constitution of the United States constitutes the 'current money of Missouri' as well as of all the other States of the confederacy."

9 Miss., 703. So also notes payable in Tennessee money, and in Arkansas money were held payable in gold and silver. Searcy *vs.* Vaner, Mar. & Yerg., 25. 1 English, 225. We are then of opinion that there was no error in taking the sum fixed by the note as the true measure of damages.

The judgment in this case was rendered on the 23d of May, and as the term for Leon county is directed by law to commence on the 4th Monday of April, and the term of the court in Gadsden intervened after that period, and before the date of the judgment, it is therefore urged that the Leon court must have been continued by adjournment beyond the term in Gadsden, and that this could not be legally done. It might be safe we apprehend, to rely in answer to this objection on the decision of the Supreme Court of the United States in the case of Hopkins *vs.* Lee, in which the court say, "the power of adjourning to a distant day is common to all courts." 6 Wheaton, 106. 4 Cond. R. 22.

We think independently of this, that the power will clearly be found to be by law with the courts of this State. "By the common law at the earliest period throughout Christendom, the whole year was one continual term for hearing and deciding causes; for the Christian magistrates to distinguish themselves from the heathens who were extremely supersitious, went into a contrary extreme and administered justice on all days alike." 2 Black., 276. 6 Jacob L. D., 210.

At a later period the Courts of Westminister Hall were prohibited from transacting business on certain holy seasons as Advent, Christmas, &c., on Sundays and some particular festivals, yet this prohibition did not extend to the Court of Parliament, the Chancery nor the Inferior Courts." 6 Jacob L. D., 210.

At the earliest period of our Territorial existence the common law of England of a general nature, and all statutes of a general nature, and not local to that Kingdom, are declared in force and are continued to this day. Duval, 357.

By a law of Congress it was provided "that the Judges of the Superior Courts shall have power to order extra terms of said courts or to adjourn them to any other time or place when the public interest may require it, and when from sickness or other cause the judges cannot hold the regular terms, giving due notice of the same." Laws of Congress 1828.

Such was the state of our law to the year 1839, the time of the

formation of the State Constitution, and the framers of that instrument so far from altering or repealing the statute and common law of the Territory in this respect, re-enacted them by that remarkable provision of Magna Charta, "all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Thus by the paramount power has the ancient rule of the common law been declared the paramount and fixed law of the land. It is insisted that because the courts are directed by law to be held on certain days, this is in the nature of a prohibiton to hold at other times. Not admitting the power of the Legislature to abridge the action of the courts, thereby closing them in effect, and denying, and delaying justice, in opposition to the express language of the constitution, we by no means admit that such direction is at all inconsistent with the power contended for. The fact that the power to hold extra terms existed in the Territorial Government all the time in conjunction with this direction to hold Courts on particular days, without conflict and without any supposition of contrariety is a conclusive answer. Indeed the use of the term extra precludes the idea of conflict, it is not a provision for the regular term fixed by law; but for a term beyond it required by the public interest, or when the regular term has not been held. If we are to be restricted to the very words of the law, and because the Legislature has said the courts shall be held on the first or other Monday of a month, as is, and has been the case in all our public acts, be required to say that they are confined to the very day, then the entire business must be despatched on that day and no other, there being no authority by law to continue beyond. But where is the reason and propriety of such restriction, why is it that such a rule is to apply to the courts to whom alone of all the public agents the emphatic language of the constitution has been so specially addressed.

The other departments of Government, the Governor, Treasurer, Secretary of State, Judge of Probate, all transact their business whenever required. We venture to say that there is not a doctrine or rule, or principle, of any law sustaining such a distinction, and that it is wholly opposed to propriety and reason. Can it be pretended that a direction to an agent to transact business on a particular day, or a particular hour of a day, is a prohibition to do it at another hour or another day? We imagine not. If authority were needed, we have

it expressly in point. "A question sometimes arises whether, when a statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be imperative or only directory; in the former only of which cases, an act done in a different mode from that pointed out by the statute would be void. A clause is directory when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibiton; thus the statute which *directs the quarter sessions to be held at certain times* of the year are construed to be directory, and the sessions held at other times are not void." 1 Smith's lead. cas., 170. Rex *vs.* Jus. Leicester, 7 B. & C., 6. 2 Ad. & El., 96.

So in Frazier *vs.* Willey, decided at the present term of this court, "Statutes directing the *mode of proceeding* by public officers are advisory and not essential to the validity of the proceedings, unless it be so expressed. 8 Vermont, 280. 6 Wend, 480.

We have spoken of the act of Congress of 1828 as operative on this subject. That it is in force it is only necessary to refer to the schedule and ordinance of the Constitution, declaring "that all laws and parts of laws now in force, or which may be hereafter passed by the Governor and Legislative Council of the Territory not repugnant to the provisons of this Constitution, shall continue in force until by operation of their provisions or limitations the same shall cease to be in force, or until the General Assembly of this State shall alter or repeal the same." If any doubt existed as to the construction of that act, a transposition of its terms would remove them; thus, the judges shall have power to order extra terms when the public interests may require it, and when from sickness or other cause the judges cannot hold the regular terms, they shall have power to order extra terms.

By law of the State, "the jurisdiction of the Superior Courts of the Territory was conferred on the Circuit Court of the State." Acts, 1845, p. 9.

We hold then, that the action of the court below, in giving judgment in this case at the time was not illegal nor prohibited, but has the sanction of the constitution and laws of the State.

The Judgment is therefore affirmed, with costs.

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

LANCASTER, Justice.

This cause comes by appeal from Leon Circuit Court. It is an action of assumpsit brought by William D. Moseley administrator of &c., of Arthur Burney, deceased, who sues for the use of Patrick Smith guardian of the heirs of John Farmer, deceased, against Robert W. Williams on three promissory notes, of which one is of the following tenor:

"By the first day of January next, we, or either of us promise to pay Arthur Burney, guardian of the heirs of John Farmer, deceased, nine hundred and sixty dollars in current Florida money for value received, bearing interest at 8 per cent. from date, this the 2d day of January, 1841.

[SIGNED] "WILLIAM W. HART."

The other two notes are of the same tenor, date and amount, and signed in like manner by Hart, but they vary as to time of payment, one being payable by the first day of January, 1843. The other by the first day of January, 1844.

To the Plaintiff's declaration, the defendant pleaded the general issue of non-assumpsit. On the trial the plaintiff gave in evidence the notes aforesaid, also the deposition of Susan C. Murray who proved that she knew the notes sued on. That she had seen them in Wm. W. Hart's possession, and that they were in his possession at the time of his death, and that when she first saw the notes, besides the name of William W. Hart, they had on them also the names of Robert W. Williams and Tom Peter Chaires. That sometime in March, 1843, Chaires came to see Hart, who was sick. After some conversation between them (of which she heard but little) Hart asked for his pocket-book and a pair of scissors, which she gave him. After Chaires had left she saw several small bits of paper on the hearth, with Mr. Chaires' and Col. Williams' names written on them—afterwards saw the notes and Col. Williams' and Mr. Chaires' names were cut off—heard Mr. Chaires say when at Hart's that he wanted his brother, Green Chaires, to do some business for him which he refused to do unless his (Tom Peter Chaires') name was taken from the notes. Witness says that the consideration for the notes sued on, was a tract of land purchased by Hart from Ar-

thur Burney, guardian of the heirs of John Farmer, deceased, of whom she was *one*. She was Hart's wife—and Chaires and Williams were securities on Hart's notes. Says also that Hart settled with Burney as her guardian, her share of the estate in his hands. Plaintiff also gave in evidence a copy of a mortgage from William W. Hart to Robert W. Williams and Tom Peter Chaires, to secure them for becoming his securities on said notes for his benefit and accommodation. Also three receipts in the hand writing of Wm. D. Moseley the plaintiff, with the endorsements on them, but signed by Wm. W. Hart. One is as follows:

"Received of W. D. Moseley, executor of Arthur Burney, deceased, thirteen hundred and sixty-five dollars and six cents, in part payment of the amount due Rufus Farmer from said Burney as his guardian, as per account current, rendered this day, January 1st, 1843.

[SIGNED] WILLIAM W. HART.
Guardian of Rufus Farmer.

[ENDORSED.]

Book acc.		6 26
Your note due 1st January, 1843,	960 00	
2 years interest 8 pr. ct.	153 60	
		1113 60
Your note,		6 00
1 yr. interest,		0 48
Your note,		66 00
1 yr. interest,		5 28
J. J. Hart 169 less,		155 48
Hire of Comfort for yr. 1843, less interest,		11 96
		1365 66

Other two receipts in same form, also for money dated same day, each for the sum of 1757 79-100, signed 'Wm. W. Hart, guardian of Argyle Farmer' and 'Wm. W. Hart, guardian of James Farmer," with the other two notes sued on, and other notes, and interest computed on all amounting to the sum of $3515 59, which was equally divided to make the last mentioned receipts—endorsed thereon as account rendered.

Plaintiff also gave in evidence a statement marked F. as follows, to wit:

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1841. Amounts of sale and hire of the land and negroes belonging to the estate of John Farmer, dec.:

Jan. 1.	Sale of land to W. W. Hart,	$4,800 00
	Hire of Ellick,	235 00
	" of Ben,	161 00
	" of Comfort,	6 00
	" Eliza,	57 00
	" of Amanda,	50 00
	" of Lina,	60 00
	" of Jane,	60 00

"This is a true statement of the sale and hire of the land and negroes of the estate of John Farmer, dec., this March 9th, 1841.

ARCHER BURNEY, Guardian."

Sworn to, March 17th, 1841, before D. McRaney, Clerk, and filed in his office.

Also statement of Wm. W. Hart, guardian, from which statement the following is extracted, as referring to this cause:

"Wm. W. Hart, guardian in account with James, Argyle and Rufus Farmer:

Received of W. D. Moseley, executor of A. Burney, dec., in Cash,	$ 40 00
In notes and accounts,	3,463 00"

"The above is as near correct as I can at this time make it, being very sick. W. W. HART, Guardian."

Some debits then follow for negro hire, not needful to be stated here, also signed by Hart, guardian. To which is appended the following:

"I charge the guardian, as per account stated above, Cash, 40 00

Notes and accounts, 3,463 00

Hire of negroes for 1843, 250 00

$3,753 00"

"The credits asked are not sustained by vouchers, and are suspended. June 5, 1842. J. E. BROOME, Judge Leon C. C."

The plaintiff then gave in evidence certified copies of three guardian bonds of Patrick Smith, dated 23d day of December, 1843.—One as guardian of Argyle Farmer, another as guardian of James Farmer, and a third as guardian of Rufus Farmer, all minors. Also a guardian bond of Arthur Burney, dated 24th November, 1843,

as guardian for Susannah Farmer, Edward Farmer, James Farmer, Argyle Farmer and Rufus Farmer, minors, and five in number. Also another bond of said Burney for the sum of ten thousand dollars, dated 14th February, 1840, conditioned to make a faithful and legal application of the proceeds of the sale of the real estate of the infant children of John Farmer, dec. Also the petition of Arthur Burney for leave to sell said real estate—representing it to be for the interest of his wards. And the order of the Judge of the County Court thereon, in these words, to wit:

"A bond having been filed by Arthur Burney, Sen., and his securities, satisfactory to the court, it is therefore ordered by the court, that on the first day of May, in the year 1840, Arthur Burney, Sen., guardian of the children of John Farmer, sell to the highest bidder the lands described in this petition aforesaid on the following terms: 1st. Notice to be given for two months previous, of the time and place and terms of sale. 2d. The terms shall be one-fifth of the purchase money payable on the 1st of January, 1841. One-fifth January, 1842,—and the balance in three equal annual instalments; the purchaser to give a joint and several bond, with three securities. The bond shall bear interest from this date; the interest shall be paid yearly. It is further ordered, that if it appear to the said Arthur Burney, Sen., that William W. Hart, in right of his wife, is entitled to one-fifth of said land, that then if the said William W. Hart and wife will execute an assignment of their rights, titles and interest to the same to the purchaser, the said Arthur Burney shall deliver over to W. W. Hart the bond which shall become due on January, 1841.

[SIGNED.] W. M. GIBSON, Judge."

Also an order dated December 13th, 1842, appointing Wm. W. Hart guardian of the estate of James Farmer, aged 12 or 13 years and his younger brothers, Argyle Farmer and Rufus Farmer, all children of John Farmer, dec., on his entering into bond, &c. All three guardian bonds of the said Wm. W. Hart, in the sum and with the securities named by the court dated 16th September, 1842. One as guardian of James Farmer, another as guardian of Rufus Farmer, and a third as guardian of Argyle Farmer. And here the Plaintiff rested his case.

The defendant offered Tom Peter Chaires as a witness. But plaintiff's counsel objected to his competency on the ground of

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interest and relied on the deposition of Susan Murray and after proofs to prove that interest; which objection, after arguments, the court sustained, and excluded the witness. To which ruling of the court defendant by his counsel excepted.

Thomas Lang called by defendant, proved that part of the land mortgaged by Hart to Williams and Chaires, had been allotted as dower to Hart's widow, now Mrs. Murray the witness in this case. That he is administrator on Hart's estate having succeeded the Sheriff who acted sometimes *ex virtute officii*. That the estate of Hart is insolvent. Witness said that the notes sued on had never been in the possession of the Sheriff nor in possession of witness. That he had other notes in his possession on which the name of Hart remained, and from which the names of sureties had been clipped, which had been satisfied. That these notes were not the only papers in Hart's possession at the time of his death, which witness was entitled to possess, and which had been taken by some person without authority. That he knew of his own knowledge a great many other papers had been so taken.

David S. Walker called by defendant, proved that in the conversation he had with Governor Moseley, plaintiff in this case, said Moseley told witness that he, as executor of Arthur Burney, became possessed of the three notes upon which this suit is brought—that after William W. Hart was appointed guardian, he Moseley, as executor of A. Burney, delivered to said Hart, guardian as aforesaid, he having first exhibited his letters of guardianship, and his bond as guardian, which Moseley regarded as sufficient, the said notes, and took therefor the receipts of said Hart, as for so much cash—that he considered himself as then parting with all claim and interest which he, as executor aforesaid, had in or to said notes—that he had always regarded the transaction in that light, and that consequently, this suit to recover the amount of said notes in his name, for the use of Patrick Smith, guardian, &c., was instituted without his knowledge or consent—that if witness would let him know when the trial should come on, he would attend and state to the court and Jury what he had then stated to witness. Witness further stated, that a day or two before the trial took place, Gov. Moseley was called, unexpectedly, on official business, to Pensacola, and that was the reason why the witness was called upon by the defendant to testify to the above facts, instead of the Governor himself.

This was the evidence offered.

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After counsel had been heard on both sides, the counsel for defendant moved the court to instruct the jury as follows:

1st. That the notes sued on were the property of Arthur Burney at the time of his death, and the legal title to the same passed to Moseley, his representative, who alone had the right to sue on the same.

2d. That if they believed from the evidence that Moseley, as representative of Burney, voluntarily and without fraud, delivered up the notes in question to William W. Hart, the principal obligor in the same, in consideration of the receipts offered in evidence, it operated as a divestiture of all title out of Moseley; and therefore, that this suit cannot be maintained in his name.

3d. That if the Jury believe from the evidence, that William D. Moseley, executor of Burney, the payee of these notes, delivered them to William W. Hart, the principal obligor, the defendant Williams was released thereby.

4th. That if the Jury believe from the evidence, that William D. Moseley, executor of Arthur Burney, deceased, agreed, in consideration of a recepit to him, as executor, of so much money as they called for, to deliver up, and did so deliver up said notes to Wm. W. Hart, the principal obligor, the same amounted to a release of the obligors thereto, and annulled and extinguished the notes.

5th. That if Wm. W. Hart, the principal obligor, came lawfully into possession of these notes, all liability on them, as securities, was extinguished, and Hart became liable, as guardian, for the money, as though the same had been paid to him in cash.

6th. That if Hart obtained the possession of these notes lawfully, he had a perfect right to destroy the same, and to cut off the names of his securities.

7th. That Hart's receipts to Moseley, offered in evidence by plaintiff, constitute perfect evidence of the payment of these notes by the principal obligor to the legal holder.

8th. That if the court shall charge the Jury, that the legal title to these notes did not pass to Moseley, Burney's representative, then and in that case, the court is requested to charge the Jury, that this suit cannot be maintained in his name, as instructed, in lieu of 1st instruction.

9th. That a suit cannot be maintained at law, in the name of any person, except the legal owner.

10th. That in the event of a verdict for plaintiff, he is only enti-

tled to recover so much as "current Florida money" is proved to be worth in specie at the time the notes fall due, and that this proof lies upon the plaintiff.

11th. If the jury believe, from the evidence produced by the plaintiff, that Moseley is the executor, and not the administrator, of A. Burney, deceased, then he cannot maintain this action as administrator.

All of which the court refused to give, but gave instead thereof, the following instruction, to wit:

1st. Instead of 1st instruction asked by defendant's counsel, the court instructs the jury, that the notes sued on in this action, were the trust property of Arthur Burney, as guardian of the infant heirs of John Farmer, deceased, at the time of said Burney's death; and that the legal title to the same passed to his administrator or executor, Moseley, in like character and effect in law, as it existed in his intestate, the said Moseley alone having the right to sue on the same.

2d. In lieu of the 4th instruction, the court instructs the jury, that if they believe from the evidence, that Moseley, executor of Burney, received from Wm. W. Hart the amount of the notes receipted for, in money, then the said notes, to the amount paid in money, were and are discharged.

3d. The court further instructed the jury, that the mere act of Wm. W. Hart, cutting the names of R. W. Williams, defendant, from the promissory note in question, cannot in any wise affect his liability, as one of the makers of said note; that if said note were void, said act was unnecessary in order to cancel it. And that if it were valid and binding in the hands of said Hart, he could not invalidate it, or release said Williams, by cutting off his name, or that of T. P. Chaires, as aforesaid; and that the jury should apply the evidence, under this and the other instructions of the court.

To which said several rulings and opinions of the court, the defendant, by his counsel, excepted.

It is also admitted by the plaintiff, that the court instructed the jury, that if they shall find for the plaintiff, that they must, in assessing the damages, find the same amount as if the notes were payable in money, instead of *"current Florida"* money. And it is admitted by the defendant, that Lang testified that he became administrator of Hart, on the day of , A. D. . These

admissions to be part and parcel of the Bill of Exceptions, to the same extent as if the same were signed by the presiding judge.

JAMES T. ARCHER,
for plaintiff,
LONG & WALKER,
Attorneys for defendant.

The errors assigned are as follows:

1. The Circuit Court erred, in refusing to allow the defendant below to examine Tom Peter Chaires as a witness in this cause, or even to swear said Chaires as a witness.

2. The Court erred, in refusing to allow Thomas Lang to answer the question propounded to him, to which exception was taken, as appears from the bill of exceptions in this cause.

3. The Court erred, in refusing to give each of the instructions to the Jury, asked by the counsel of defendant below, numbered in the bill of exceptions from one to eleven, inclusive.

4. The Court erred, in each of its instructions to the Jury, set forth in the bill of exceptions, from one to three, inclusive.

5. The Court erred, in trying this cause, and pronouncing judgment in the same, on the twenty-third day of May, A. D. one thousand, eight hundred and forty-six, as set forth in said record,—the said 23d day of May, A. D. 1846, not being embraced within either of the terms of the Leon Circuit Court, as established by law.

LONG & WALKER,
Atty's for Appellant.

We will for the present pass over the first and second assignment of errors in this record, and consider the third and fourth. This brings before us the instructions asked by defendant below and refused, and also those which were given by the court. And the first enquiry necessary to be made is, who are John Farmer's heirs? By reference to the bond executed by Arthur Burney, it will be seen they are Susannah Farmer, Edward Farmer, James Farmer, Argyle Farmer, and Rufus Farmer. *Five* minors and infant children of John Farmer, deceased.

2d. What interest had Arthur Burney, guardian, in the notes sued on at the time of his death?

It is admitted on all sides, and indeed is too plain to be denied, he was the legal holder and had the right to sue on them when past due. But they were made payable to "Arthur Burney, guardian of the heirs of John Farmer, deceased," and were not negotiable.

It is true the words guardian, &c., may be considered as mere *descriptio personam,* and do not necessarily include the idea that Burney took and held the notes as guardian. But the consideration on which the notes was given is explained by the testimony of Mrs. Murray. It was for the sale of the lands belonging to the five children and heirs of John Farmer, deceased, and if Burney strictly pursued his authority to sell, would vest the equity in the proceeds of the notes in his wards unless he has clearly shewn an election otherwise.

Did Burney pursue his authority for selling the lands of his wards? By reference to the order of the County Court it will be seen,

1st. He was to give notice for two months previous of the time, place and terms of sale. It does not appear by the record whether he did or did not; it is not shewn and cannot be inferred.

2. The sale was ordered to be on the first day of May, 1840.—It occurred on the first day of January, 1841.

3d. The terms were five annual and equal instalments of the purchase money, the first on the first of January, 1841, and yearly thereafter. The purchaser to give joint and several bonds with three securities. He gave joint and several promissory notes with two securities.

4th. The bonds were to bear interest from the day of sale (1st of May, 1840.) The notes bear interest from the 2d of January, 1841.

5th. The interest to be paid yearly. By the notes it is payable when they respectively become due.

6th. The bonds were to be payable in money. The notes made payable in current Florida money.

It will be apparent to every one that Burney repeatedly, and in some respects materially, departed from his authority to sell. The difference in the value of the fund arising from the sale of the land was on the 1st of January, 1845, $542 62—is was so much less valuable than if the sale had taken place when directed, and interest had been payable as directed, by reason of the non-observance of the terms. But Burney never reported the notes to the court as he took them, nor the securities he had taken to secure their payment. On the contrary he merely reported to the court the sale of the lands, which is offered in evidence by the plaintiff, and hereinbefore set out. As much as it as here material may be correctly stated thus:

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"1841, January 1st. Amount of sale of land belonging to the estate of John Farmer, deceased.

"Sale of land to W. W. Hart, 4,800 00

"This is a true statement."

[SIGNED] "ARTHUR BURNEY,
Guardian."

Which was sworn to March 17th, 1841, before the Clerk of Leon County Court, and filed in his office.

An enquiry naturally presents itself, what is the legal effect and import this statement, and return made by Arthur Burney, guardian, to the County Court? No exhibit of bonds as required by the order of court, nor of the notes taken, no mention of the securities or their number—nothing to show any departure from the order requiring the payment of interest annually—nor any effort to obtain from the court an approval of his actings and doing in the premises. It must be considered an admission that he as guardian had in his possession $4,800 00 for the sale of the land, to bear interest according to law, and to be distributed among his five wards as they should respectively arrive at lawful age. He by his return bound himself as guardian, as fully for the purchase money arising from sale of the lands as he did for the hire of the negroes. Not having been ordered by the County Court (so far as appears) to put out this money at interest upon mortgage security as directed by the statute, see Thomp. Dig. p. 207, sec. 2, it results he retained it by leave of the court, and bound himself to pay interest for it according to law.—He upon his own petition obtained the order of court to sell those lands. He stood before the court in the double position of *quasi* commissioner to sell the lands, and of guardian to the five heirs.—He does not as commissioner report what he has done, but as guardian what he has in possession. His authority to sell was not pursued, but departed from, and therefore cannot bind his wards. But his statemnt of having sold the land to W. W. Hart for $4,800 binds him, binds his securities, and binds Moseley his legal representative. Having elected merely to report the amount of the sale and being bound thereby as guardian—the notes taken to secure the purchase money, became his, not only legally but equitably.—The day he charged himself on the record as guardian with the amount of the sale, all equity in the notes taken to secure payment vested in him absolutely.

Moreover, Burney paid the share of one of the heirs to W. W.

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Hart, her husband, and thereby extinguished the interest, which she (Susan Farmer) had in the notes, so that *eo nomine* "heirs of John Farmer, deceased, could not be the claimants in equity of the notes or of their proceeds, his guardianship of her interests was surrendered to Hart her husband. But Burney was as appears by the testimony adduced and made a part of the record of this case, at the time of his death guardian of the four other heirs of John Farmer, deceased, to wit: of Edward Farmer, and of the three for whom after his death Wm. W. Hart was appointed guardian, and for whom after his death Patrick Smith gave bonds as guardian.—Burney having in his life time paid and settled the interest and claim of one of the heirs of John Farmer, deceased, it is not even plausible, that he was the mere legal holder of notes payable to "Arthur Burney, guardian of the heirs of John Farmer, deceased," for the use of the remaining four heirs, and less plausible when a less number claim—suppose Burney in his life time had paid four of them and but one remained to be paid, might not that one with equal propriety claim the equity of these notes, as the three for whom Patrick Smith has given bond as guardian. If the plaintiff succeeds in this case, it is for his own benefit or for the use of Patrick Smith, or for the use of the heirs of John Farmer, deceased. If for the use of the heirs of John Farmer, deceased, it will be unjust because one of them has received her share. If for the use of Patrick Smith he has neither legal or equitable claim to it. If for the benefit of the plaintiff Moseley, he must shew a strict legal right.

The truth is, this suit is brought wrong to enure to the benefit of the heirs of John Farmer or any of them—if intended for the benefit of the wards of Patrick Smith, and if they have a joint interest, it should have been, James and Argyle, and Rufus Farmer, by their next friend Patrick Smith, 4 J. J. Marshal, 389. Thomp. Dig., 320, sec. 5. If their interests are several their suits should have been.

The designation of Patrick Smith, guardian of the heirs of John Farmer, deceased, is not supported by the proofs on the record. There are five of them, he has given bonds as guardian for but three —and unless his claim is for his own use (and of that there is no pretence) he has neither legal or equitable standing in the case.

Waiving for the present the legal liability which Burney in his life time had incurred by binding himself and his securities for the amount of the purchase money and interest accruing on the sale

of the lands belonging to Farmer's heirs—let us proceed to the time of his death and consider what follows that event. Moseley the plaintiff in this suit, took letters testamentary under his will and consequently became his legal representative. He examined the condition of affairs, made himself acquainted with Burney's liability as guardian of the heirs of John Farmer, saw that he was bound on two bonds, one in the penalty of $5000, and another in the penalty of $10,000, conditioned for a faithful application of the proceeds of the sale of the lands, and for paying the heirs as they respectively attained lawful age. Saw that his testator had paid Hart, the husband of Susan, her share—and that there remained four to settle with. Saw that Hart had been appointed guardian of three of them. Examined his appointment and his bonds, and considered them good. Saw the return his testator had made to the County Court, and considered his estate bound for the amount. And being so bound that the notes sued on belonged to his estate. He knew moreover that the receipts of the newly appointed guardian for any debts, rents, or sums of money belonging to each of his wards would be a good discharge for his testator Burney, and effectual in law signed severally as guardian for his several wards, if he could ob- to full age, see Thomp. Dig., 201, sec. 6. Knowing, or believing all this, it is not difficult to suppose he would come to a settlement with Hart, strongly disposed to procure from him receipts for money, signed severally as guardian fr his several wards, if he could obtain them. That a receipt for the notes to be held for the use of John Farmer's heirs, would not suit his purpose. But if it would, Hart could not give such receipt being guardian for but three of them.

Coming to this settlement under these impressions, he, Moseley, the plaintiff in this action, wrote the receipts himself—he stated the account current on the back of them himself. He took them severally for each of Hart's wards, for money expressed to be in part payment of the amount due from Burney as guardian—and Hart signed them as guardian of the wards in each case.

It is not possible to perceive what consideration was given Hart, to induce him to sign and deliver money receipts, to Moseley, executor of Burney, unless he and Moseley agreed to consider his notes due to Moseley, executor, as cash. And the account current (in the hand writing of Moseley,) on the back of the receipts, charging up these notes and the interest due on them, as part consideration

for the receipts, well sustains this idea. This was at the suggestion of Moseley, he was prominent actor in shaping these receipts.—They are as he fixed them. They were filed in the Clerk's office of the county, to protect Burney's estate *pro tanto* against Farmer's heirs; to operate as a credit in favor of Moseley, executor, in the settlement of his accounts with the estate of Burney, his testator.—It may be added, they served the purpose of shewing the amount of Hart's liability as guardian to his three wards severally. No allegation is made of any surprise, mistake, or fraud, in obtaining these receipts—to the contrary, it was admitted all was fair and correct. But it is objected to allow these receipts to operate is to allow Hart to make testimony for himself. This is not perceived. The plaintiff offered them in testimony. He wrote them—he obtained them—he uses them against Hart to discharge Burney's estate for so much—and for the additional purpose of crediting himself with their amount as executor, in his settlement with the estate. They shew that Hart received their amount in money, which binds him and his securities to his wards. Moreover Hart is not a party to this suit, but Williams; and his, Hart's interest is equal both ways, if Williams is bound his, Hart's securities on his guardian bonds are not, if Williams is not bound they are. But in either event Hart's estate is bound. The evidence of Hart's liability to his wards as their guardian is found in his receipts to Moseley.—The evidence that Moseley parted with the notes and all interest in them to Hart is found in the account current on the back of them in Moseley's hand-writing. He did not assign them in writing, but by delivery—he did not assign for the use of John Farmer's heirs; but if for their use then severally to three of them. If he intended to deliver the notes to Hart to be kept as notes for the use of the three young Farmers why did he not take receipts to that effect? he could as easily have written such as those he did write. Or why did he enquire into the solvency of Hart's securities on his guardian bonds, but with a view to convert Hart's notes given to Burney into cash.

There is every evidence it was the intention of Hart, and the understanding of Moseley at the time of making those receipts, that he, Hart, elected thereby to bind himself as guardian for the amounts specified in the receipts? Indeed it is preposterous to suppose him bound as guardian for the amount of the receipts, and also bound for the proceeds of the notes. But if Burney's estate can have

credit for the amount of the receipts, and this is not controverted, Hart, and his sureties on his guardian bond are bound for the amount.

Moseley then delivered the notes sued on to Hart, the principal obligor in them, as and for payment for the receipts which Hart gave him. He considered them in that transaction, as Walker testified as so much cash, and that he parted with all claim and interest in them—and it must be they were considered as cash by both parties, or Moseley obtained receipts for money without paying it, and such a transaction would not be free from surprise, or mistake, or fraud.

Who is it that is at liberty to explain by extraneous proof a written receipt. This rule was manifestly intended to protect the maker against surprise, mistake, &c., in executing a receipt. But I apprehend no case will be found where the party protected by it or for whose use it was given has claimed the benefit of the rule especially when he wrote it himself. The receipts of Hart, made evidence by plaintiff, shew that Hart paid the notes sued on—and they were delivered to him. Other testimony of plaintiff shews that Hart while possessor, cut off the names of Chaires and Williams (the defendant,) who were his securities on these notes, as he did in other cases of his notes with sureties when he paid them—that this was done at the instance of Chaires in the case of these notes—and that the notes remained, and were in possession of Hart, at the time of his death.

How or on what consideration Moseley again became possessed of them is not shown. Counsel seemed coy in approaching this inquiry. It is not pretended that Hart's administrator ever delivered them away. He thinks himself still the legal custodiary of them —and says in his testimony "they were taken from among Hart's papers by some person having no authority." These circumstances raise a violent presumption in this case, that Moseley is not now the rightful holder of the notes, and has no legal interest in them or right to sue on them.

It was incumbent on him to repel this presumption. The record furnishes no such proof.

It is said this suit was brought for the use of Farmer's heirs, that the equitable interest attaches in them in the notes, and they have the right to elect their remedy on the notes. It has been shewn that the equity as well as the legal right was in Burney in his life

time, by his election to charge himself as guardian with the amount of the sale of land. It has been shown that this suit is not and cannot be for the use of Farmer's heirs.—The record shews that the three for whom Hart was guardian are yet minors. Their right of election is personal to themselves when they arrive at mature age and cannot be delegated during their minority. It has been shewn that Moseley paid these notes to Hart the principal obligor for the receipts which he obtained, and extinguished all demand which he as executor had on them, unless he may be allowed to take the receipts as for money, use them for purposes valuable to himself and his testator as money; and deny in this action having given money for them. It does seem equity, as well as law, would estop him from alleging anything to the prejudice of these receipts. An estoppel, says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Cited 2 Smith's L. C., 430. In this case Moseley, the executor, wrote the receipts, and induced Hart to consider his notes as money, and as payment for them. Hart signed them severally as guardian and Moseley accepted and used them as money receipts. Ought he now to be allowed to allege them to be anything else.

Mr. Justice Cowen in the case of Dezell vs. Odell, 3 Hill's Rep., 219, lays down an estoppel in pais to be "an admisison intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct, which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction."

Applying this rule which appears both lucid and just: Moseley to obtain money receipts from Hart the guardian considers his Hart's notes to Burney as cash, admission tending and intended to influence Hart to give receipts to him for money; by this admission of Moseley to Hart, he, Hart, is actually led into a line of conduct prejudicial to his interest unless Moseley be estopped the power to retract. He and his sureties on his guardian bonds are bound to his wards severally for the sums which by his receipts he acknowledges to have received. This retraction, if allowed, would bind him also to Burney's estate or to Farmer's heirs for the amount of the notes—which were the consideration in part for the receipts.

These receipts being then valid when given, and not alleged to have been executed by surprise, or mistake or fraud, but to have been fairly given and fairly received; and having been offered in

evidence in this case by the plaintiff Moseley, may be considered good evidence of such facts as they establish. The prominent facts established by them are, That Hart acknowledged by them the receipt as guardian of the sums of money specified in them respectively, and thereby elected to charge himself in his liability as guardian with the amount; and second, in consideration of so charging himself as guardian the notes sued on were delivered to him by Moseley as paid and discharged.

This view is supported by the return of W. W. Hart as guardian of James, Argyle and Rufus Farmer. He reports himself as having received of Wm. D. Moseley, Executor of A. Burney, dec.:

In Cash,	40 00
In notes and accounts, .	3,463 00

And adds, "The above account as near correct as I can at this time make it, being very sick." He then accounts for the hire of certain negroes amounting to $250 00. And the Judge of the County Court enters thereon "I charge the guardian as per account stated above;" and after setting forth the items, again sums up and says $3,753 00. Thus it will be seen the judge on the return made by Hart, as guardian, charges him as such with the whole amount which he admits he had received. The return was in amount obviously incorrect: but Hart says it was as near correct as he could make it, being very sick. The proof shews he was sick in March, and died during the year; there is no date to his return. It may therefore be as true as he could make it at the time when made.— But right or wrong the Judge of the County Court considered it sufficient and proper evidence on which to charge him as guardian with the whole amount.

From the foregoing it is plain, that at the time of settlement between Hart and Moseley, Hart was debtor to Burney's estate, therefore to Moseley the representative of that estate, on sundry notes given by him to Burney, guardian of the heirs of John Farmer, dec.; and also that he was guardian of three of these heirs. That in consideration of the delivery of these notes to him, and their supposed payment, (by both parties) he gave Moseley the money receipts in evidence in this suit, and bound himself and sureties on his guardian bonds for so much money: does this amount to an extinguishment of the notes due from him as a principal debtor, and by operation of the law of retainer, render him liable as guardian?

It will be remembered these receipts shew the several sums which

he acknowledges to have received, as guardian, severally of his wards, and in addition to this evidence of election to hold as guardian. The County Court charges him as guardian, with the whole amount he acknowledges to have received. The evidence in both ways is sufficient to fix his indebtedness in that character. He was the person to pay and the person to receive; by operation of law when this conjunction occurs, the money is regarded as *ipso facto* paid. Gray *vs.* Brown, 1 Richardson L. R., 337. Simpkins *vs.* Cable, 2 Bailey R., 60. Joyner *vs.* Cooper, same, 199, 202-3.

The case of Gray *vs.* Brown above cited, was an action against the surety on a guardian bond.

The court held that when the right of receiving a fund as guardian, and the duty of paying it as trustee unite in the same person, the law presumes performance of the duty, and without further proof a surety of the guardian is liable. But the court say when the right to receive and the duty to pay *absolutely concur* there can be no election. Whenever, by this *concurrence* or by *election,* the retainer is established, it is no answer for the surety of the character that has received by retainer to say, that the default occurred in the other character. In that case Carroll the principal held funds as *trustee* which he had been directed to re-invest but had failed to do so.—He was also *guardian* of his *cestui que* trust—and the question was whether the liability fell on his sureties, on his bond as *trustee,* or as guardian. The court say, "If in the case before us it should be supposed, that under the bond taken by the commissioner of B. R. Carroll as trustee there was a right of action in the commissioner for the trustee's default to re-invest, or that said right of action was in the minors, suing by their next friend, it will be perceived that whatever sum may have been received in either form, would have belonged to the minors, and might have been made payable *to the guardian* whenever the order of the court of equity should have been made for said payment. The case would have been just as it is now if judgment or decree for the amount of his default as trustee had been obtained against B. R. Carroll, and that the chancellor had directed his retainer as guardian." The court further said, "Proof of the trustees inability to pay his debts could not prevent the presumption of retainer, for this debt may have been met, although others could not have been. Even entire destitution of means would not seem to arrest the presumption of payment, which by law results from the union of *debtor and creditor* in the same per-

on." The cases of Simkins *vs.* Gable, 2 Bailey, 60. McDowell vs. Caldwell, 2 McCord, 304. Joyner vs. Cooper, 2 Bailey, 199. Schneill *vs.* Schroeder, et al., Bail Eq. Rep., 334. O'Neal *vs.* Hurbert, McMull.'s Equity Report 496, all seem (the court say) to regard the extinguishment of the prior debt as a necessary legal result of this union. Gray *vs.* Brown, 1 Rich. R., 364.

In Schneill *vs.* Schroeder et al., 1 Bail. Eq. Rep., 364, the court held "a debt due by an administrator to his intestates estate is assets *in his hands;* and if the administrator of an intestate becomes also the administrator of one of the distributees, his liability for the distributive share of the latter, in the estate of the former, attaches upon his *second administration.* And if he also becomes *guardian* of the sole distributee of his second intestate, his liability attaches upon him in the *latter* character, and for a default in paying over of funds in his hands, to which his ward is entitled as distributee of the *first* intestate, the sureties on his guardianship bond are alone responsible.

Jacob H. Boyer died intestate in 1817, leaving three children, Mrs. Schroeder, wife of John Schroeder, the defendant, Jacob F. Boyer, and Mrs. Wirtemburgh, who were the distributees of his estate. The defendant Schroeder took out letters of administration on the estate—and Schneill, the complainant, and one Herman Moore became sureties on his administration bond. Mrs. Wirtemburgh died subsequently leaving an only child, a daughter, who since intermarried with the defendant Marshburn. Schroeder also administered on the estate of Mrs. Wirtemburgh, and thereafter was appointed guardian of her child.

The bill in this case was filed by Schneill, one of the sureties on Schroeder's original administration bond, to enjoin proceedings at law, in an action brought against him on said bond, for the recovery of a sum alleged to be in the hands of his principal, Schroeder as administrator. And the court held, upon the death of Mrs. Wirtembrugh, Schroeder, as her administrator, was himself *alone* entitled to receive her dividend of the estate of her father, Jacob H. Boyer. It was in his hands, and (the court say) the condition of the bond was not only *legally* but *literally* fulfilled. The whole object of the bond is to secure the payment of the proceeds of the estate to those who may be legally entitled to receive them. But the claim of Marshburn and wife upon the complainant are still one degree further removed. Schroeder was appointed guardian of

Mrs. Marshburne when she was an infant (supposed regularly and upon sufficient security) and the *necessary* consequence of this was that the amount in his hands, to which she was entitled as distributee of her mother became so much *held* by him in trust for her *as guardian;* and according to McDowell *vs.* Caldwell, 2 McCord Ch. R., 55, the sureties to the guardianship bond are responsible for it. And the circumstances referred to constitute a complete bar to the right of Marshburne and wife to recover at law. 1 Bail. Eq. R., 340.

In the case of Hall *vs.* Hall, 2 McCord Ch. R. where it was shewn that the executors themselves owed considerable sums to the estate, the court held the following language:—"The decided cases say, that these debts are so much *cash* in the hands of the executor; and the court will often order executors to pay the debts they owe, into the hands of the proper officer of the court for the security of the parties interested, 2 Cox's Ca., 377; Eggleston and Coventry *vs.* Kingston, 8 Vesey, Jr., 466; Berry *vs.* Usher, 11 Ves., Jr., 87; Toller on Ex., 480; 6 Mass. R., 149; 11 do., 256.

A debt due by the executor of the estate of a testator, is assets upon the same plain reason upon which an executor, who is a creditor, may retain; that he cannot *sue himself.* 13 Ves., Jr., 263; Hankey *vs.* Garrett, 3 Bro. C. C., 458; and it has been held a sufficient cause for the appointment of a receiver, Winthrop *vs.* Bass, 12 Mass. R., 199; Middleton *vs.* Dodwell, 13 Ves., Jr., 268-9. Thus the principle seems well settled, that where an executor or administrator having assets in his hands is also *guardian*, he can elect to hold the share of the legatee or distributee (his ward) in his character of guardian, and thus exonerate the sureties on the administration bond, and thus charge those on the guardian bond.

In the case of Joyner *vs.* Cooper, 2 Bailey's Equity Reports, one indebted by specialty to the estate of a lunatic, is appointed committee of his estate, and the specialty is transferred to and accepted by him as committee. The court held the debt extinguished, and the sureties to his bond as commissioner are liable for so much received by him. So far as that case is applicable, it is as follows:

John McNish was by a decree of the Court of Equity directed to account with the commissioner for his actings and doings as commissioner of John Dupont, the lunatic. He was reported by the commissioner to be indebted to the estate of the lunatic in the sum of $8,802 47-100, and the report was confirmed and made a decree

of the court. In the amount reported was included the sum, principal, and interest, of a bond for 1,200, which McNish owed, and which was due to the estate of the lunatic before his appointment to be committee; after his appointment this bond was transferred to him by Thomas Dupont his predecessor in the office of committee and accepted by him. And it remained in the hands of his attorney uncancelled at the trial of the case. McNish being removed his successor instituted suit on his bond as committee and recovered judgment on it for the whole amount of the decree in equity. On this judgment among the questions raised one was: whether John McNish was properly charged as committee with the amount of *his own debt,* as so much money *received by virtue of his trust.*

Upon this point the presiding Judge delivering the opinion of the court, says: "I regard the point as settled, that where one owes a debt to a trust, and afterwards assumes the management of the trust, the amount of *his debt* shall be considered as so much cash *in his* hands". Upon appeal the court said, "This court concurs in the opinion of the presiding Judge below, on all the questions he has discussed. The second ground, however, presents a question which although in effect decided by the judgment below, it may be necessary to decide expressly here. It cannot be denied that the committee of a lunatic is not subject to any further liability, if on the revocation of his powers he has accounted for and paid over the funds in his hands, to whomsoever may be legally entitled to receive them. Who in this case was entitled to receive from the former committee, Thomas Dupont, the funds in his hands? Unquestionably the committee, John McNish, who was appointed in his place. The commisisoner of the court had no right to receive them, unless specially authorized by the court. McNish's appointment clothed him with all the power to receive and manage the estate of the lunatic. If he thought proper to settle with the former committee without even an account before the commissioner, he could do so, and his receipt for the funds was an act, to which he was fully competent. If he thought proper to receive *his own bond* there was nothing in the undertaking or duties of his trust to prevent his doing so; and the money due on the bond became thereby *a part of the trust fund,* and his sureties are answerable for it." See Joyner *vs.* Cooper, 2 Bail. Eq. R., 205.

The foregoing case seems analogous in principle and in every

essential feature, parallel with the case under consideration.

In the case of Galphin *vs.* McKinney, 1 McCord Ch. R., 298.—Nott, Justice, in delivering the opinion of the court said, quoting from the Chancellor's opinion appealed from, "The order of the court it is said, directing the delivery of the bond to McKinney as the executor of the estate of Galphin, was not intended to operate as a discharge of the debt, for there was no proof of payment made: nor was it put to the court, that in making that order it was intended to cancel the bond, and release the surety." The Justice in reply to these views of the Chancellor says: "With the most respectful deference for the opinion of the learned Chancellor who delivered that decree, I cannot bring my mind to concur in that construction of the order delivering the bond to the obligor must of itself imply an intention to place it entirely at his disposal. What other intention can possibly be conceived? It is said it was delivered to him as executor *"eo nomine,"* for the benefit of the estate, and if he destroyed it he was guilty of a breach of trust. If it was delivered to him for the benefit of the estate, it was for the purpose of enabling him to appropriate the money due on it, to the payment of the debts and legacies of the estate. It was then giving the entire credit to the *principal;* and the court would violate its own rules, not to construe it into a release of the *surety.* The destruction of the bond was no breach of trust, because being in the hands of the obligor it became a dead letter. The misapplication of the fund might have been a breach of the trust; but the surety on the bond was not answerable for that. He was not security for the faithful administration of McKinney."

If the foregoing views have any force or propriety, and they are authoritative in South Carolina, where they have been acquiesced in and approved by the courts, they seem to apply themselves to the case we are now discussing with peculiar fitness.

In the case of O'Neall *vs.* Herbert, Dud. Law and Equity Rep. Dec. Term, 1837, page 31-2, Chancellor Harper, delivering the opinion of the court, said, "I suppose that if an administrator have in his hands the balance of an estate, and is afterwards appointed as guardian of an infant entitled to it, he will be chargeable as guardian, and the sureties on his guardianship bond will be liable, as in the case of Simkins *vs.* Cobb, (2 Bailey R. 60) referred to by the Chancellor. So, if before his appointment he has received a sum of money as in McDowell *vs.* Caldwell (2 McCord's Ch. R., 55) or if in any

of the court. In the amount reported was included the sum, principal, and interest, of a bond for 1,200, which McNish owed, and which was due to the estate of the lunatic before his appointment to be committee; after his appointment this bond was transferred to him by Thomas Dupont his predecessor in the office of committee and accepted by him. And it remained in the hands of his attorney uncancelled at the trial of the case. McNish being removed his successor instituted suit on his bond as committee and recovered judgment on it for the whole amount of the decree in equity. On this judgment among the questions raised one was: whether John McNish was properly charged as committee with the amount of *his own debt*, as so much money *received by virtue of his trust*.

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vs. Cooper, 2 Bail. Eq. R., 205.

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other capacity he be indebted to himself as guardian, being unable to sue himself, the debt shall be presumed to be paid, and he and his sureties will be liable.

In the case of Pratt et al. *vs.* Northom et al., 5 Mason R., 108, Mr. Justice Story says: If any act had been done by Ambrose by which *he elected* to pass the property to his guardianship account, or if he had charged himself with it, in the Probate Court *as guardian,* there would be little difficulty in adopting the construction, that by operation of law it was instantaneously transferred to his accounts as guardian.

The real question in this part of the case, is, whether without any admission of assets, or any admission of responsibility as guardian, a Court of Equity is bound to make that application for the party, which he has not made for himself; in this respect it differs materially from Taylor *vs.* Deblois. See 5 Mason R. 108.

In the case of Taylor *vs.* Deblois, 4 Mason R., 133, the court said: "The principle of retainer is, where the party unites in himself by representation, or *otherwise* the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands." The learned judge further said, "I see no reason upon a review of the authorities, to doubt the accuracy of the statement; and it is supported by Burdett *vs.* Fix, 1 Roll. Abr. Title Executors L. 3, C. 45. 2 Browlows, R. 50. Woodward *vs.* Lord Darcy, Plowden R. 184. Toller, C. 3, Chap. 3. Same 109. 8 Serg't & R. 24, 30. 1 Pothier on Ob. 425.

In the case at bar, Hart did not owe money by representation, but admitting that Burney in his life time, and Moseley his representative, after his death, held these notes in trust for the use of Hart's wards, after that transfer, then he owed them *otherwise,* to wit, as principal; and according to the doctrine in the last case cited, inasmuch as he could not sue himself, was entitled to retain, and the law will presume a retainer in satisfaction of his debts to them.—This case is very unlike the case of Pratt et al. *vs.* Northom et al. There the guardian admitted no assets either in that or any other character; but it is plain from the case, had he admitted assets as guardian, Judge Story, who tried that cause would have charged him as such, and held all responsibility under his administration bond as *extinguished.* Here Hart receipts for the notes as cash, and signs the receipts *as guardian.* He accounts with the County Court

for what he had received *as guardian*, and is charged by the court in *that character* with the amount. In this case then the duty to pay and receive both devolved on him, and the law presumes a retainer as guardian, and an extinguishment of the notes sued on. In this case, Hart elected to receive as guardian and account with the court as guardian. And by his election a retainer of the funds as guardian, and an extinguishment of his notes as principal was worked, according to the authorities cited, "as a necessary legal result."—And he not only became chargeable as guardian for the amount so received, but to the extent of his return to the County Court, in fact was so charged.

Is Moseley bound to Hart's wards, the young Farmers, for the amount of these notes?—most obviously not, because the receipts he took of Hart the guardian, releases the estate he represents for that much; and are also good vouchers for him in his settlement of that estate.

That the mere loss or destruction of a note will discharge the liability of principal or surety, is a proposition which we apprehend will not be seriously urged by any one; we do not understand, however, that Williams the appellant, rests his defence on that ground.

But because the notes were delivered to Hart the principal as paid and released—or if not so, because by delivery to him as guardian the amount became chargeable against him and his sureties on his guardianship bonds—or because by delivery to him as guardian the right of action became suspended by operation of which his sureties, on the original notes (the subject of this suit,) were discharged. It was suggested in argument on the part of the appellee Moseley, that these receipts of Hart, guardian, to Moseley, executor of Burney's estate, are receipts made by the debtor, and to allow them as evidence of extinguishment of the original notes, or of retainer as guardian, is to permit the party to make evidence for himself. It must be recollected these receipts were taken by, and delivered to Moseley the plaintiff in this suit below; it also appears by the testimony they are in his hand writing, and by the bill of exceptions, that they were put in evidence by him in the Circuit Court. It is too late to make the objection after he, Moseley, has used them and offered them in evidence below, to refuse to the appellant any benefit he may derive from them here. A party offering evidence is understood to waive all objection to its competency. Greenleaf *vs.* Birth, 5 Pet. R., 132-7-8. These receipts were received by Moseley,

executor of Burney, from Hart, guardian of three of Farmer's heirs; Moseley, the appellee wrote them; Hart, as guardian, signed them; Moseley offered them in evidence. Williams, the appellant, had nothing to do, as far as appears, with the making of them, or their custody, or any connexion with them whatever—why may he not avail himself of evidence thus thrown in his way? Their chief effect is to shew that Hart elected to charge himself with their amount as guardian of his wards; and this is evidence of the same kind usually referred to for that purpose; most of the cases before cited turn on such testimony—to which may be added the case of Alston *vs.* Munford, where the guardian Munford was charged as such, (though he was testamentary guardian without security, and his securities as executor were discharged,) because he so charged himself on his own books, and to a bond debtor, whose debt had been bequeathed as a specific legacy to his ward, he wrote, apprizing him of the fact. 1 Brock. R., 278. In the case of Taylor et al. *vs.* Deblois, et al., 4 Mason R., 135, the only evidence of transfer was a certificate given by Mrs. Deblois to the Probate Court that she (who was administratrix,) held the funds as guardian, this Judge Story held to be conclusive, and she became bound as guardian, and her securities as administratrix were discharged.

The weight of the objection that Hart received these notes, *eo nomine* for the use of Farmer's heirs, is not perceived. He did not receipt for them as notes; but for their amount, both principal and interest, as money. He did not receipt for them as guardian of Farmer's heirs; but separately as guardian of three of them, there being five. Moseley, the appellee, was an actor in making and receiving these receipts, they were moulded, as he thought best, to serve his interest. He surrendered the notes to Hart the principal obligor in them, as the consideration for the receipts and according to his own statements in evidence in the record, thought he was parting with all interest in them. By that act he suspended his right of action against Hart and his sureties on these notes for an indefinite period, that is during Hart's life time afterwards. This (if the doctrine of retainer did not apply) would be giving time to the principal in consideration of the receipts, without the privity or consent of the surety, and would in law discharge him. U. S. *vs.* Hillegan, 3 Wash. C. C., 70; Bank of Steubenville *vs.* Hogue, 6 Hamm., 17; Kennebec Bank *vs.* Tuckerman, 5 Greenl., 130; Bank *vs.* Woodward, 5 New H., 99. The delivery of a note, bill or execution, with

intend to *transfer the debt* upon a *fair* bargain, and for a *valuable* consideration, is a sufficient assignment. Fitcomb *vs.* Thomas, 5 Greenl., 282; Clark *vs.* Rogers, 2 do., 157; Jones *vs.* Witter, 13 Mass., 304; Dunn *vs.* Schnell, 15 do., 485. And so held of other choses in action. Briggs vs. Dorr, 19 John., 95; Prescott vs. Hall, 17 do., 284; Vose *vs.* Handy, 2 Greenl., 322; Robbins *vs.* Bacon, 3 do., 349; Onion *vs.* Paul, 1 Har. & John., 114. These and numerous other authorities sustain and make valid the transfer by Moseley to Hart of the notes sued on.

It is said in argument, these notes were not extinguished, but the right of action was suspended during the lifetime of Hart, the guardian, and again revived at his death. It will be remembered the only legal holders of these notes were Burney in his life time; Moseley, his executor, after his death, and Hart, the guardian, by transfer, by delivery, from Moseley for a valuable consideration.—So that any time after the notes were five years past due, the statute of limitations would have been a valid as well as meritorious plea, for the appellant, Williams, who is only a surety. The accident of the death of Hart is the fact on which the law of the case is therefore made to depend. Had Hart lived until these notes, or any of them, were five years past due—after that, a plea of the statute of limitations, would have been a bar to a suit brought against Williams the surety, on all of them so conditioned. For during Hart's life, Moseley, the appellee, had no right of action against the surety Wiliams, he having parted with all interest in the notes. It seems therefore the right of Moseley to maintain this action does not depend upon any legal title, which he has in, or to the notes sued on; but upon the death of Hart, to whom he had transferred them, and all interest in them for a full and valuable consideration.

The court being equally divided in opinion the judgment of the Circuit Court will stand. But I for the reasons herein stated, think that W. D. Moseley, the appellee, in this Court, and plaintiff in the Court below, has not shown a legal ground of action against Robert W. Williams, the appellant here, and defendant in the Circuit Court, and that the judgment of that Court ought to be reversed.

Upon the question of holding adjourned terms of the Circuit Court raised by the exceptions in the record of this cause, the 3d section of the act of 1828 to regulate judicial proceedings, Duval L., 90,

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

provides "when any Judge shall not attend on the first day of the term, the Court shall stand adjourned until twelve o'clock on the second day, and if said Judge shall not then attend, it shall be the duty of the Clerk at that time to continue all causes and adjourn the Court to such time as the Judge may appoint, or until the next regular term by law established." Justice Lancaster, and Chief Justice Douglas, are of opinion that the Judges have power under this section to adjourn the term of the Circuit Court at the time, and under the circumstances provided in the section above mentioned (to hold adjourned terms of the Court) at any time not to interfere with the regular term of any other Court in the Circuit, but that their powers to adjourn terms under other circumstances, seem not to be created by statute; therefore, no opinion is given on that point.

HAWKINS, J., for Affirmance.

DOUGLAS, C. J., for Reversal.

JOSEPH C. OSBORNE AND WIFE, *vs.* THADDEUS D. VANHORN, ET AL.

It may be regarded, as established by the English and American decisions, that a mother is entitled to an allowance for the maintenance of her children out of their fortunes, especially where her own fortune is inadequate.

In gneral this allowance is to be confined to the annual income, and should not extend beyond it; but where the property is small and more than the annual income is necessary for the maintenance of the infants, the Court will sometimes allow the capital to be broken in upon.

If there is a necessity for breaking in upon the caiptal of an infant for his maintenance, the proper course is *first* to apply to the Courts for its sanction. If, however, this course is not adopted disbrusements beyond the income are at the peril of the guardian, and he is bound, before he obtains an allowance for such disbursements, to show a state of facts demanding and justifying them and should produce the vouchers, &c., of his expenditures.

The statute of limitations is no bar to items of such expenditure, disbursed more than five years anterior to the filing of a bill by the distributees for an account and distribution.

Where real estate is, by order of the County Court, converted into money, the heirs and distributees cannot claim that the one-third belonging to the widow of intestate for her natural life, be paid over to a master, to be by him laid out at interest. Her life interest in money in her hands is not subject to be disturbed, except on a shewing of fear of loss or making away with it, and even then she should have the privilege of giving security for it.

Joseph C. Osborne and wife, vs. Thadeus D. VanHorn, et al.

Appeal from a decree in Chancery rendered in Leon Circuit Court, DOUGLAS, Chief Justice, presiding.

Thadeus D. VanHorn, in right of his wife, Mary Ann, daughter of Daniel Faust, deceased, with others, also children of said Daniel, filed their bill in Chancery against Mary Ann Osborne, (formerly Mary Ann Faust, widow of said Daniel,) administratrix of Daniel Faust, and Joseph C. Osborne her present husband, for an account of the administration, and distribution of the surplus. The defendants answered and submitted their accounts, and claimed an allowance for many items of expenditure for the children of Daniel Faust disbursed since his death. The defendants also claimed the use, during the life of Mrs. Osborne, of one-third of certain moneys, realized by a sale of real estate of the intestate made by order of Leon County Court. It was referred to a master to make and state an account of the administration, and of the surplus for distribution. The report of the master allowed the administratrix the disbursements for the maintenance of the children of Daniel Faust, and the use for life of one-third of the moneys realized from the sale of real estate. The allowance for maintenance of the children was not confined to the annual income of the children. Exceptions were filed to the master's report, and are considered in the opinion of the court delivered by Justice Baltzell to which reference is made for the further material facts in this case.

In the court below a decree was rendered in favor of complainants directing the widow's third of the money arising from the sale of the real estate to be preserved in the hands of the master to be laid out at interest for her benefit during her life, and excluding all disbursments by the administratrix for the maintenance of her children (heirs of Daniel Faust) made more than five years previous to the filing of the bill.

From this decree the defendants (appellants in this court) appealed, and the complainants took a cross appeal.

This cause was argued by,

Mr. Archer, for Appellants, and

Mr. Gwynn and *Messrs. Long & Walker* for Appellees.

BALTZELL, J., delivered the opinion of the court:

This suit is instituted by the Complainants to recover from the

administratrix of Daniel Faust, dec., the distributive share due to them as heirs of the decedent. The accounts of the administratrix where referred to a master, the exceptions to whose report constitute the ground of appeal to this court. The mother, now Mrs. Osborne, was administratrix, and complainants object to allowing her "any sum whatever for board and clothing her own children; this they say was her duty by law and nature." And, secondly, admitting the claim, she was entitled to use no more in their support than the annual interest or profit of their estate. By the common law it was the duty of parents to support their minor children. 1 Bl. Com., 446.

It has been, and continues to be, an established rule in equity to allow maintenance where the parents are not of ability. Harley *vs.* Bannister, 4 Mod., 275. "It is not necessary that the father should be absolutely insolvent, but that he should not be in sufficient circumstances to maintain his child suitably to his reputation." Buckworth vs. Buckworth, 1 Cox, 80. "So in previous cases it was held that a parent must maintain his child unless totally incapable, or by having a numerous family of children he borders on necessity.' 1 Mad. Chy., 344.

Where the circumstances of the father are sufficient for the maintenance of the infant, the court will compel him to do it, and refuse an allowance. 1 Ark., 514. 6 Vesey, 349.

A mother seems to occupy a position somewhat different from the father. Thus Lord Hardwick, in said, "As to compelling the mother to maintain her daughter out of her own estate, it will be going too far." 2 Atk., 446.

Lord Eldon has repeatedly declared, "a master cannot do a wiser thing for the benefit of a family than to make a liberal allowance out of the children's fortune for their maintenance and education to a mother who is inadequately provided for." Note to 1 Brown Ch. R., 164, Bradshaw *vs.* Bradshaw, 1 Jac. Pr. 647.

The maintenance will be allowed when the father is not of ability although the mother has a separate estate. 1 Cox, 275.

A mother married to the second husband is not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. 1 Brown, Ch. R., 268.

The English authorities are to the effect stated. Let us see how far the American Courts agree. In Hoffman's Master in Chancery we find "it is the course of the English Courts to appropriate a cer-

tain sum out of the fortune of the infant for his support, and to direct a reference to fix the amount. This is not usual here; the disbursements are judged on the settlement of the guardian's account. The English course is in some respects preferable, least troublesome to the guardian, and least expensive—as the guardian would be allowed the whole sum fixed for his maintenance without providing his disbursements. But it has this disadvantage, that the guardian having a fixed sum, may be tempted to profit by it by diminishing the proper allowance to the infant. 2 Atk., 618. Hoffman's M. C., 135.

The case of Susannah Bostwick, decided by Chancellor Kent was that of a mother of six children having a share of her husband's estate amounting to $3,682.99, a legacy of $250, 1-5 of a house and lot in New York, subject to life estate of her mother, 56 years of age. The Chancellor directed an enquiry as to what yearly sum would be a proper allowance for the mother and children, and to examine and report on the justness and truth of the charges for past maintenance. In the case of Hayward *vs.* Hayward's executor, the Court of Chancery of S. Carolina say, "The children are entitled to a considerable estate, and she has not more than a competent provision for herself. It is reasonable, therefore, that she should be relieved from the burthen of maintaining and educating them. The allowances ought to be liberal but not beneficial. The mother ought to be indemnified for all expenses on account of her children, but not for her care and attention." In this case the sum of $2000 annually was allowed for the maintenance and education of her daughter, and the maintenance of her sons. 4 Dess., 445. It may then be regarded as established both by the English and American decisions, that a mother is entitled to an allowance for maintenance out of the property of her children, especially in cases where her own provision is inadequate.

The second exception is, that this allowance is to be confined to the annual income, and should not extend beyond it.

This no doubt the general rule, the exception is where the property is small, and more means are necessary for the due maintenance of the infant. In this event the court will sometimes allow the capital to be broken in upon. 2 Story's Eq., 584.

This rule is founded in prudence and a just regard to the rights of infants, to prevent extravagance and incautious action on the part of guardians. The rule, however, is not inflexible. In the case of

Bostwick above referred to, the subject of breaking in upon the capital of the infant, and of allowance out of the infant's estate for past maintenance were both considered, and the Chancellor says of the former: "We must impair the principal sum or give no relief.—The capital is small when divided among the six children, and we may well adopt the remarks of Lord Keeper North in Barlow *vs.* Grant, "that it was fit and reasonable that part of the principal of a child's legacy of £100 should be allowed for his education.—The money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education. But in the case of a legacy of £1000 or the like, it might be reasonable to restrain the maintenance to the interest of the money.

The petitioner also asks for reimbursement for the past maintenance of her children, or for the discharge of debts which she has of necessity incurred for that purpose. Such an allowance is also within the rules and practice of the court. Lord Thurlow held that no such allowance could be made; but afterwards, 6 Vesey, 454, Lord Eldon approved of this old practice by Lord Rosslyn, and allowed a father to be reimbursed for the past maintenance of the child.

Lord Thurlow was said to have changed his first opinion on this point, and Ld. Alvanly frequently made a retrospective allowance for maintenance, and the practice afterwards grew familiar. 9 Ves., 285. 11 Ves., 1. 14 Ves., 449. The old rule says Chancellor Kent would lead to great inconvenience, for though the wants of the infant might be ever so pressing he could not receive any maintenance (charity excepted) without the expense of a suit and reference to a master." 4 John. Chy., 104.

In addition to the quotation already made from Hoffman's Master in Chy. we find the opinion of Lord Hardwick as to exparte applications for maintenance. "I had a doubt whether the court could upon exparte applications allow maintenance for an infant where no cause is pending, *for it is at the peril of a guardian in socage what he applies for maintenance,* and he will be allowed according to the discretion he has used, &c. 2 Atkins, 315. Hoffman's M. C. 136. The same authority says, "if the petition prays maintenance as well as a guardian, which is usually the case in England, the or-

der includes a direction to the master to consider what is proper to be allowed for the maintenance and education of the infant. If the guardian proposed has expended anything before, the words *for the time past* and to come should be added."

In such a case the state of facts laid before the master should contain in addition to what is requisite to the appointment of a guardian, a statement of the items of previous disbursements, which may be by way of schedule and a proposal of their amount to be allowed for previous disbursements, as well as an annual sum for future maintenance. The statement of expenditures must be proved by vouchers as usual. The state of facts should contain everything except what is peculiar to the proposal for guardianship. It should be sworn to, and the voucher produced of past expense if any."—Hoffman's M. C., 136. 3 Br. Ch. R., 88. 1 Br. Ch. R., 179.

In the case of McDowell *vs.* Caldwell, the subject was considered by the S. C. of South Carolina, on exceptions to the report of the master, and the court said, "no account has been furnished of the actual expenditures, or of the length of time they were boarded abroad; and the basis of the charge against them is by probale conjecture as to what would be the expenses of board, tuition, clothing, &c., for the whole length of time. It is a well settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under peculiar circumstances which do not enter into this case, and generally it is limited within the income. 2 McCord's Chy., 58.

We are of opinion then, that as a general rule, the guardian should be confined to the income; and if there is necessity for invading it, his proper course is to apply to a court for its sanction in the first instance. If, however, he does not adopt this course, disbursements beyond the income are at his peril, and he is bound to shew a state of facts and circumstances demanding and justifying them, and should produce the vouchers, &c., of his expenditures. The exceptions in this case assert the general principle that the mother is not entitled to anything, and secondly, to no more than the income. Had specific objections been presented as to the mode of allowance by the master, the want of vouchers, &c., there might have been greater difficulty in sustaining the report.

The second exception presents the enquiry whether there are in the facts of this case as presented by the master, a sufficient excuse and justification for the guardian to break in upon the capital of

these infants. This can be determined only by reference to the condition of the estate in the hands of the widow, shewing her income as well as that of the infants. There were seven children of the intestate, all of them daughters but one, at the time of his death, Oct., 1833. One died four months after him, another eleven months, and the boy two years afterwards.

The administratrix had four negroes,			
Valued at		1,125 00	
Provisions,		240 00	
Other property,		401 25	
		94 00	
Debts due the estate,		247 50	
		2,107 75	
Paid debts,		701 58	
			1,406.17
In January, 1835, a sale of lands and lots was had,		2,136 48	
Debts paid,	569		
	608		
		1,187 00	
			948 48
In March, 1838, was a further sale of real estate,		3,992 04	
Debts paid		371 02	
			3,620 92
			$5,975 58

The legal interest on the amount of the portions belonging to the widow and the distributees will be, according to an authority quoted, a fair test of the annual income of each, and we have endeavored so to regard it, without aiming at entire accuracy in the calculations.

Deducting the thirds of the widow from the $1,406 in her hands to Jan., 1835, and there will be as a portion to the children $937 34; the interest on which for a year would be $74 98, to be divided amongst seven children for their support, making an allowance of near eleven dollars to each, for board, clothing and education to the 1st Jan. 1835. Proceeding to 1838, and adding this principal of 937 34 to the sales made in that year, after deducting the widow's dower, ($632) we have the sum of $1,596, the income of which, $125, is to be divided amongst four children, making $31 for each,

for maintenance and education to March, 1838. Progressing to this period, and adding the sum of $1,569 to the $3,620.92 deducting the dower, ($1,206.97) leaves $2,413.95, which added to $1,568 makes $3,982.95 as the property of the infants, the interest of which is $318.36, making $79.68 each, to be divided amongst the four children.

We will now enquire as to her means of support for herself. Her share to Jan., 1835 was $468.66, yielding an interest of $37.39. In 1835 her share was enlarged 632, making with the 408, $1,100.66, and giving an interest of $88. In 1838 her share was enlarged 1,206, making with the 1,100, $2,306, giving an interest of $184.48.

If correct in this view we think it very clear that at least until 1838 there was a deficiency of means, both of the widow and children, and that a Court of Equity, if applied to, would have allowed the capital to be broken in upon; and there being no complaint of the exhorbitance of the charges, or mistake of the master in this respect, we see no reason for disturbing his report. These two exceptions were then, in the opinion of this court, properly overruled by the court below.

We do not concur, however, with that court in sustaining the eighth exception of complainants. The statute of limitations does not, in our opinion, bar the items charged for support of the children. The complainants ask equity, and must be required to do equity. They cannot expect to exact payment from the administratrix of this fund without allowing her all fair payments and deductions arising from and connected with her administration. This should be overruled.

We think, too, the court erred in ordering the amount in the hands of Mrs. Osborne, as her share for life, in place of dower in the lands, to be paid over to the master, and by him laid out at interest. Mrs. Osborne has a life interest in this, not subject to be disturbed except on a showing of fear of loss or making away with it by her; and even then, she should have the privilege of giving security for it. But there is neither proof nor allegation of any peril attending its being with her. On the contrary, looking to the care and prudence in the past management of the property, there is every fair presumption of her taking proper care of it in future. It would, in our opinion, be dealing very harshly with one who has acted so well and so faithfully to her children to exhibit a distrust of her honesty in this respect. It is so seldom that courts are called

to pass upon a case exhibiting so much merit, such rare fidelity and worth, that we would by no means discourage it by undue harshness or severity.

Indeed in looking at the state of accounts as exhibited by the master, we have been struck with the extraordinary prudence and success attending the management of the affairs of this estate by this lady; and that during the disastrous periods of embarrassment and losses from 1838 to 1847. "No losses," says the master, "are claimed to be allowed for bad debts or depreciated money. No charge is made for supporting negro children, or taking care of sick negroes, and not a single medical bill charged."

Some reliance has been placed upon the agreement between Osborne and his wife, as preventing any allowance for board after the marriage. We do not regard it in that light. Osborne binds himself to his intended wife not to make a charge for board, but does this exclude and prevent her from doing it. This same agreement provides a separate interest to the wife in her property, and the design was probably to leave it to the management of the wife as a part of her separate affairs. The deed or contract is by no means clearly expressed. Still it is between Osborne and his wife, and not between them and the children. The latter were not parties—did not contribute to its consideration—are not bound by it in any way, how then can they claim under it?

A majority of the court are of opinion that a sufficient allowance has been made in this case independent of the ten per cent. on the interest and hire, and direct this to be disallowed. They are by no means prepared to reject it as a good general rule, but think under the circumstances of this case, a deduction should be made in this respect.

We are then of opinion that the exceptions of complainant be overruled, and that the decree allowing the exceptions as to the statute of limitations, and the order for distributing the life estate of Mrs. Osborne, and allowing the ten per cent. aforesaid, be reversed. In other respects the Master's Report is confirmed. The case will be remanded with instructions to enter a decree in conformity with this opinion.

Joseph B. Watts, Administrator of Thomas T. Clardy, vs. James Clardy.

JOSEPH B. WATTS, ADMINISTRATOR OF THOS. T. CLARDY, VS. JAMES CLARDY.

A deed using the terms "have loaned to A. during her natural life, and after her death hath given unto the heirs of her body which shall survive her, to be equally divided amongst them:"

And a devise "I lend unto my daughter A., during her natural life and after her decease to the heirs of her body, share and share about," were held as well by the laws of South Carolina as the common law of England to create an estate-tail in personal property so as to vest it obsolutely in A., and on her marriage in her husband. On her death the property belonging to his administrator, and not to her heirs.

Writ of Error to Hamilton Circuit Court.

Joseph B. Watts, administrator of Thomas T. Clardy, brought suit in Hamilton county in *detinue* against James M. Clardy for the recovery of certain slaves named in the declaration, and alleged to be detained by defendant.

The jury at the trial, on the 6th of April, 1846, found a special verdict as follows:

We, the jury, find that Thomas T. Clardy, the plaintiff's intestate, died possessed of the negroes sued for, that the plaintiff demanded the same from the defendant, who after the death of the said Clardy detained and still detains the said negroes, that said demand was duly made before suit was brought; and the jury assess the value of the negroes as follows:

Charles at	$600	Sanco at	$200
Daniel at	$600	Moses at	$300
Samuel at	$300	Bellat at	$300
Charlotte at	$400	Patience at	$200
Silvey at	$500	Lavinia at	$300
Tenor at	$500	Violet at	$100
Maria at	$500	Maria at	$500
Cass at	$600	Mary at	$150
Boston at	$600	Jenny at	$150

That the following named negroes, to-wit: Charles, Silvey and Tenor are the same negroes named in a certain instrument of writing, under which defendant claims for himself, and as guardian for

his brothers and sisters, the property therein mentioned, dated April 21st, 1827, made by Wm. Gore, which is hereunto annexed, marked exhibit A., whereby the said negroes, with future increase, which increase since born are Maria, Boston, Cass, Sancho, Lavinia, Moses, Bella, Patience and Jenny, were deeded to Anner Clardy, to have, hold and enjoy during her natural life, as therein mentioned; that the following named negroes, to-wit: Sam, Violet and Maria, Daniel, and Charles, (together with Mary, child of Maria, since born,) are the same negroes which were devised, under and by virtue of the provisions of the last will and testament of William Gore, senior, in favor of Anner Clardy, as therein set forth, dated the 30th of May, 1825, and hereunto annexed, marked exhibit B., under the provisions of which will, and the eighth and ninth clauses thereof, the defendant, James M. Clardy, for himself and as guardian for the rest of the children of said Thomas T. and Anner Clardy, claim property. That the said William Gore died 30th October, 1828; that the said Anner Clardy was his daughter, and is the same person named in said will. And the said Anner Clardy and Thomas T. Clardy were married and resident in the State of South Carolina at the several times and before the dates of said instruments. Exhibits A. and B. That said exhibits are fully proved and authenaticated; that Anner Clardy departed this life in the year 1839, and that the said Thomas T. Clardy survived her and has since died, and that the plaintiff is his administrator; that the defendant, James M., and his sisters and brothers, to-wit: Amanda, John, Alva, Vienna and Mary Ann, the children of said Anner, survived her and her infants at the time of her death. And forasmuch as the jury are ignorant in point of law upon the facts of the case, on which side they ought to find the issue, they do agree that if the court should be of opinion, that Mrs. Anner Clardy took an absolute interest, as first taker in the negroes devised under William Gore's will, by virtue of the provisions in her favor, which negroes are herein before set forth; and, also, took a like interest in the negroes above mentioned, which were deeded, with their increase, by the deed of 1827, by said William Gore, which negroes in such event, by reason of such inter-marriage, vested in her husband, Thomas T. Clardy, as absolute owner, then they find for the plaintiff, that he recover the said goods and chattels in the declaration mentioned, and so above assessed, wrongfully detained by the said defendant, or the value there-

of, as above assessed, and his damages about his suit, to wit: ten dollars and costs.

But if the court are of an opposite opinion, and consider that the children of Anner Clardy took by purchase or remainder-men, or otherwise, at her death, under said will and under the limitations of said deed, then they find for defendant, and that he doth detain the the negroes above named; but in either event, he doth detain the negroes, Grace, of the value of one hundred dollars, and Chloe, of the value of three hundred dollars, and assess their value as above, with ten dollars damages, and costs of suit. We further find that defendant doth not detain negro Isaac, in said declaration mentioned.

THOMAS H. HAGNER,
Attorney for the Plaintiff.
B. C. POPE,
Attorney for Defendant.
ARTHUR ROSSITER,
Foreman.

(EXHIBIT A.)

Horry District.
STATE OF SOUTH CAROLINA,

To all people to whom these presents shall come, I, William Gore, of the State and District aforesaid, send *Greeting*:

Know ye, that I, the said William Gore, for and in consideration of the natural love and affection which I have and bear unto Anner Clardy, during her natural life, and to the heirs of her body, and for divers good causes me hereunto moving, have loaned unto her the said Anner Clardy, during her natural life and after her death, hath given to the heirs of her body which shall survive her, to be equally divided amongst them, the following negroes, with their future increase, viz: Charlotte, Silvey and Tenor; the said Anner Clardy to have and to hold and enjoy during her natural life, the said negroes Charlotte, Silvey and Tenor, and their future increase, and after her decease, to be then equally divided between her surviving heirs, as their exclusive property. I, the said William Gore, do by these presents bind myself, my heirs, executors and administrators, and family, to the intent the said Anner Clardy shall have a life time estate in the aforesaid negroes, and at her decease to be equally divided between her surviving heirs as aforesaid mentioned.

One thousand eight hundred and twenty-seven, witness whereof I have hereunto set my hand and seal, this April 21st day, Anno Domini 1827.

(Signed,) WM. GORE.

Recorded, Nov. 1827.

Test: JOHN GORE,
REBKAH FRINK,
WILLIAM BESSERT.

(EXHIBIT B.)

In the name of God: Amen.

I, William Gore, Senior, of Horry District and State of South Carolina, being of sound and perfect mind and memory, blessed be God for it, do this 30 day of May, in the year of our Lord one thousand eight hundred and twenty-five, make and publish this my last will and testament, in manner as follows: I resign my body to the dust from whence it came, my soul to God who gave it me. First. I lend unto my beloved wife Mary, during her natural life, as much of the plantation where I now live, as much as Exectuors, hereafter to be named, shall think necessary for her support. Also as many of the negroes as they shall deem proper for her comfortable support. Also as much of my stock of cattle, sheep and hogs, household furniture, plantation tools and so forth, together with a good riding horse; all which shall be during my said wife Mary's natural life and no longer; then to be equally divided between my lawful heirs, share and share about.

Secondly. I give unto my son John Gore, one hundred acres of land that he has now in possession. Also two hundred and fifty acres lying on the Beaverdam swamp. Also three hundred and forty-two acres of the lower part of the Daniel Gore lands.

Third. I give and bequeath unto my son William Gore, the land that he has now in possession; also from Poplar Branch to Cyprus Branch, and up the said Cyprus Branch to the main road leading from Mourney's to George Reaves' ferry; also one hundred acres lying above said road, being all that tract.

Fourth. I lend unto my son Jonathan Isaac Gore, the balance of my plantation whereupon I now live, after my Executors has laid off my wife her part, and after her death, the said land which my said Executors has laid off for my said wife Mary. Said land shall begin on the lower line on Capt. Randall's corner, thence running up

little river, such a distance and out to the back line as shall make three hundred and eighty acres out of a tract of seven hundred acres which said tract of three hundred and eighty acres shall include my buildings and at least four acres around them, should the dividing line not allow it, said dividing line shall be as nearly paralled with the East line of the said tract as possible, and the balance of the said tract of seven hundred acres shall be to my daughter Mary Meike, as hereafter will be mentioned.

Fifth. I lend to my daughter Rebecca Frink, two hundred and fifty acres of land lying in the Seven Creeks, known by the name of the Rich Island; also three hundred acres taken off the upper part of the Daniel Gore tract of land lying on Gum Swamp in Columbus county, during her natural life, then after decease, I give and bequeath the said unto the heirs of her body to be equally divided betwixt them.

Sixth. I lend unto my daughter Mary Mick during her natural life three hundred and twenty acres of land whereon she now lives, being the balance of the trust that I gave to my son Jonathan Isaac Gore, and provided that his part does not include the buildings, he shall extend to take them, and she shall be allowed as many acres out of his part immediately below it; also two hundred more out of a tract lying on Cedar Creek, the balance of the tract which is fifty two acres, to Jonathan Isaac Gore, and shall be taken off adjoining the hundred acres that he now lives upon, one hundred acres more to Jonathan I. Gore, lying on Cedar creek whereon he now lives, and if there are any of my Bigelow land left unsold at my decease to be equally divided between Mary Mick and J. I. Gore.

Seventh. I lend unto my daughter Kitey Thomas during her natural life, five hundred acres of land whereon she now lives, including Mullet creek land bought from Maj. Day. Also two hundred acres of my Bigelow land where she formerly lived, and after her death the land shall be equally divided between her heirs, share and share about.

Eighth. I lend unto my daughter Anner Clardy, during her natural life, a tract of land in her possession, containing one hundred and fifty acres, more or less; also one other tract of five hundred acres lying in Waccammay, where she now lives, and after her decease to return to the heirs of her body, share and share about.

Ninth. It is hereby declared to be my will, that at my decease my Executors hereafter to be named, shall divide all the remainder and

residue of my negroes, stock of all kinds, household furniture, plantation tools, ready money, debts that are due me, and all other any personal property not already divided, betwixt my said sons and daughters having an equal share, only my son Jonathan I. Gore, and my daughters Rebekah Frink, Mary Meik and Kitey Thomas and Anner Clardy are only lent during their natural lives, and then to return in manner above mentioned. Also what negroes, stock and property my wife Mary may have at her decease, shall also be equally divided between my sons and daughters in manner and form before directed.

Tenth. Also, if my lands lying in Columbia should be unsold at my decease, for to be equally divided between my sons John Gore and William Gore.

Eleventh. If there should be any debts due at my decease, each one of my heirs shall pay an equal share.

Twelfth. I also ordain my sons, John Gore and William Gore, executors to my last will and testament. I also appoint them as trustees for the heirs of Jonathan Isaac Gore and Rebekah Frink, and Mary Meik and Kitey Thomas and Anner Clardy, to procure the property by me given, that they are not defrauded out of their right.

In witness whereof I have hereunto set my hand and seal, the day and date above mentioned.

(Signed,) WM. GORE, [SEAL.]

Signed, sealed in the presence of us,

WILLIAM VAUGHT,
THOMAS BRANTLEY, Jr.,
JOSEPH VAUGHT.

On the first June, 1846, the court below (Judge Macrae presiding,) gave judgment for the defendant, on the points of law arising upon the special verdict.

The plaintiff filed his exceptions to the opinions of the court, and now prosecutes his writ of error in this court, upon the following errors assigned:

1. The court erred in giving judgment for the defendant in th

court should have been for the plainti

Joseph B. Watts, Administrator of Thomas T. Clardy, vs. James Clardy.

Randall & Hagner, for Plaintiff:

The question now submitted by the special verdict and presented to this court are:

1st. Whether the terms of said deed and will (either or both of them) legally import and convey to Anna Clardy, such an absolute interest and estate as, by reason of her intermarriage with Thomas T. Clardy, vested the same in him as absolute owner? Or,

2d. Whether the estate vested in said Anna Clardy and her husband, being only a life interest, the residue of the interest and estate, after her death, vested in her children, the heirs of her body, who survive her, as purchasers, or remainder-men, or otherwise?

It is our duty to maintain and prove the affirmative of the first proposition and the negative (of course) of the second.

And first, to examine the will, which is prior in point of date.

The verdict refers to the 8th and 9th clauses as determining the estate which is to pass to Anna Cleardy.

Both parties will probably invoke other clauses of the will as influencing the decision to be made.

On the whole will, then, we contend:

1st. *That the terms used in the 8th clause, respecting the realty would have vested in her and did vest in her, at common law, an estate-tail general.*

We here premise that this proposition is laid down and to be discussed and proved, as furnishing the true test and indeed the only rule for ascertaining the nature and extent of the estate in the personalty, bequeathed to Anna Clardy under the 9th clause taken in connection with the 8th clause. As regards the realty, it is in conformity with the rule in Shelly's case—now and at all times an authoritative rule in England and America. See 4th Kent's Com., 221.

That rule is stated to be "that when the ancestor, by any gift or conveyance, taketh an estate of free-hold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate and not words of purchase." 4 Kent, 206. Hays on the disposition of real estate, p. 17, 46.

For the general rule we shall cite no other authorities directly,

but the court will find it confirmed and reiterated in citations made for other doctrine to be advanced.

The will in question contains precisely such a bequest or demise in its general terms, and we will now examine if any other supplementary terms in the will vary, restrict or control such limitation.

It may be contended that the words "lend and loan" used in reference to Anna Clardy's estate for life, vary and restrict the interest given to her, and, as containing evidence of a *"secondary"* intention variant from the general intention, overrule the latter. This we deny.

1st. Because it is one of those "petty distinctions" which in the language of Lords Eldon and Redesdale, in Jessen *vs.* Wright, 2 Bligh. 1, (quoted from 2 Jarman on Willis, p. 286,) should not overrule the paramount intention of the testator, as evinced by the use of the technical terms "heirs of the body."

2d. The terms are not technical nor appropriate, and being used in connection with other terms of clear, unequivocal legal import, shall not be allowed to qualify the meaning.

The most that these words could import would be, that the property was not specifically given, but only "its use" for life.

Conceding this effect, then we contend that such a bequest of the use or profits or interest of chattels, conveys the right to the chattels specifically and absolutely. Robinson *vs.* Fitzherbert, 2 Brown's C. C., 127. Butterfield *vs.* Butterfield, 1 Ves. Sen., 133. Bradley *vs.* Perixot, 3 Ves., 324. Keys *vs.* Goldsbro', 2 Har. & J., 369.

Another clause may be invoked by the other side to effect such variance or qualification in the terms "return to the heirs of her body share and share about." These words import a different order of distribution from that the law of descent would cast in England by the common law, and *there* the argument might have plausibility at least.

Here they can have no effect, where the law of descent or distribution and that wrought by the will are the same. That they produce no such effect in England, the following authorities will show. Pearson *vs.* Vickers, 5 East., 548. Doe *vs.* Smith, 7 T. R., 531. Doe, &c., *vs.* Cooper, 1 East., 229. Robinson *vs.* Robinson, 1 Bur., 15. 2 Jarman on Wills, 277, 280, 287.

But the 12th and last clause may be replied upon, to fix the con-

struction of a life estate in Anna Clardy, by operating of the "trust" assigned to be raised in the Eexcutors, as Trustees, "to procure," such remainder to the "heirs."

To this we answer, 1st. That the raising of a trust (if such arise from the terms of the 12th clause, which we deny) would produce not the asserted effect. Wright *vs.* Pearson, Amb., 358. Doe ex dem Thong vs. Bedford, 4 Maul. & Sel, 362. 8 T. R. 516-18. 1 Bro. C. C. 313.

2d. But in fact and law, this will raises no proper trust, technically so called.

No estate, vests in the trustees. No interest or property in the subject vests in them.

The estate, title and property in the slaves and lands had previously passed to the legatees in possession and expectancy.

There is certainly *no express* conveyance of title to the trustees, nor can one arise by implication, as here no power is conveyed "to sell," "to charge," "to settle," or to do any act from which such investure of estate or interest can arise to them. The case in the books nearest to the present, that I can find, is that of Pigot *vs.* Garnish, Croke, Eliz., 678.

This is, however, a leading case, as appears by reference to Fletcher on trustees, p. 12.

The authority there conferred was similiar to the present, and ruled to be a mere "naked power."

The above remarks apply particularly to the will.

The terms of the deed are not materially variant in their limitation, and should be taken even more strongly against the grantor than the testator, for an obvious reason.

Wills are construed to favor the intention of testator, while grants in deeds are always taken most strongly against the grantor. This is too plain a principle of law to need citation of authorities.

But we need not invoke this principle of construction. The only new clause appearing in the deed different from that in the will, is that the limitation is to the "surviving" heirs of the body of Anna Clardy. The cases I shall cite to prove the unimportance of this term is Richards *vs.* Lady Bergavinney, 2 Vernon, 324, where the terms used were—"and to such heirs of A's body as shall be living at her death"—terms fully equivalent to surviving heirs. *In this case A. was ruled to have an estate tail.* Sharp *vs.* Thompson, 1

Vhart., 139. Kiffner *vs.* Knapper, 6 Watts, 18; Tidball *vs.* Lupton, 1 Rand., 194. Botts *vs.* Gillespie, 5 Rand., 273.

No trust is set up in this deed, and this point, therefore, does not arise.

II. The second general proposition: That the same terms of limitation being used in the 9th clause, connected with the 8th clause in regard to the slaves, the property in dispute, as were used in relation to the realty in the 8th clause, would have created in said slaves, also at law, an estate tail, if such limitation were allowed.—This so naturally results as a corollary from the first proposition and the facts above stated, that no distinct argument will be required to support it. It is also connected with and involved in the third general proposition, which I propound as follows:

III. The third general proposition: That terms of bequest of chattels real, or of other personalty, which in relation to devises of estates of inheritance would give either an express or implied estate-tail in the first legatee, give the absolute interst or property therein to such first legatee or taker. 4 Kent's Commen., p. 277.

The reason given in Kent, and in all the authorities, is that such attempted limitation is personalty as an estate tail, is too remote and tends to produce a pepetuity.

As a rule of English Law the following cases establish it: Attorney Gen. *vs.* Bailey, 2 Brown C. C., 553; Robinson *vs.* Fitzherbert, Ibid, 127, Lord Kenyon's opinion; Lord Chatham *vs.* Tothill, 6 Bro., P. C., 450, this case is stated and commented on in 11 Wend., 259; Britton *vs.* Twinning, 3 Meriv., 176; Butterfield *vs.* Butterfield, 1 Ves. Sen., 133; Bradley *vs.* Perixot, 3 Ves., 324; Ross *vs.* Ross. 1 Jac. & Walk., 154. *American Authorities*—Dott and others *vs.* Cunnington, 1 Bay, 453; Stockton *vs.* Martin, 2 Bay, 471.—See also, 1 Hayward, 247, 163; 2 Ib., 130, 154; 2 Dess., 94; 4 Dess., 17; 1 Nott & McCord, 69; 7 Yerger, 519; 12 Wheaton, 568. A leading case and authority is 11 Wend., 259, app. 671, Patterson *vs.* Ellis. Lastly, case of McCardle *vs.* Beatty, Ct. of App. Fla.

IV. The fourth general proposition: The charge in gross raised in the 11th clause of the will, *"per se,"* and in the absence even of other suitable limitations would raise and confer an estate of inherit-

[illegible] Anna Clardy. Bacon's Ab. Tit. Legacies, Let. C. 3;

[illegible] Slater, 5 T. R., 335. Jackson dem. Deck-

er, vs. Morrell, 6 T. R., 185, (Dig. N. Y., Rep., 4 Vol., p. 1264, art. 188;) Speaker *vs.* Van Alstyne, 18 Wen., 200, (referred to in 4 Dig. N. Y., Rep. p. 1258, art. 131-2.)

Cormack, for Defendant.

Long & Walker, on same side.

However edifying it may be to the "judicial scholar on whom his great master Coke has bestowed some portion of the gladsome light of jurisprudence," to trace out and dwell upon the intricate history of "*the rule in Shelley's case,*" we are content to enter upon the discussion of the construction of this will and deed according to the simple rules of law as at present understood to exist.—The brief and elegant review of the various decisions of the British and American Courts on this subject from the Year Books down to 1830, to be found in the 4th volume of Chancellor Kent's Commentaries (214 to 233) is quite sufficient to show what is now the law on this subject. "All the modern cases contain one uniform language, and declare that the words *heirs of the body,* whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party," is the remark of Kent in concluding his review of the English cases. It devolves upon us to satisfy the court that in this case it "clearly and unequivocally appears" that those words are not used in their technical sense; for says Chan. Kent, (Com. 220) "there are several cases in which in a devise, the words *heirs or heirs of his body,* have been taken to be words of purchase and not of limitation in opposition to the rule in Shelley's case," and then enumerates the several classes of these cases: 1. "Where no estate of freehold is devised to the ancestor." 2. "Where the testator annexes words of explanation to the words heirs, as to the heirs of A. *now living,* showing thereby that he meant by the word heirs, a mere *descriptio personarum,* or specific designation of certain individuals." 3. "Where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate."

In order to determine whether the case at bar comes within either of these exceptions to the rule in Shelley's case, we will exam-

ine the two instruments under which we claim title to the negroes in controversy, as remaindermen, after the termination of the life estate of Anner Clardy. And first, as to the deed: We contend that the words *"heirs of her body"* mean children, and not general heirs, because the other accompanying expressions clearly afford that explanation. First: The property is declared only to be *loaned* to Anner Clardy, and given to the children. Second: Because the loan is expressly declared to be *for life* only, and this thrice expressed. Third: Because the remainder is limited to such heirs of her body "as shall survive her," which would be nonsense if applied to heirs generally, but consistent if *children* are meant.—Fourth: Because the property so given to the surviving heirs of her body is "to be equally divided between them, share and share about," which is a provision that might be inevitably defeated if heirs generally are intended.

Now we contend that these explanatory expressions bring this case within the second rule of exception above quoted from Kent, viz: "Where a testator (or in a deed the donor) annexes words of explanation to the word heirs, as to the heirs of A. *now living,* showing that he meant by the word heirs, a mere *descriptio personarum,* or specific designation of certain individuals." In this deed, instead of the explanatory words, "the heirs of A. *now living,*" we have the expression, "the heirs of her body which shall *survive her,*" which equally constitute a "mere *descriptio pensonarum,* or specific designation of particular individuals." The case given by Kent to illustrate the rule of exception is exactly in point with the case afforded by these instruments. Indeed it is too obvious to require argument that the rule of exception laid down by Kent is as clearly illustrated by this case as the one which he puts. In both, the word *heirs* is used—in the one the heirs of A. *now* living, and in the other the heirs of Anner Clardy living at her death. There is exactly the same reason for regarding the one as meaning children, and not heirs generally, as the other, viz: because it excludes the idea of any other.

To show that the case at bar comes properly within some one or other of the exceptions before mentioned, we will cite such American decisions as we have been able to find on this subject. Judge Carmack having already dwelt sufficiently upon the English cases, we shall make no reference to them.

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Learned counsel upon the other side laid great stress upon the case f Keating and Wife vs. Reynolds, reported in 1st Bay, 80, beause "it is a case decided in South Carolina where this deed was ade." We also invoke the particular attention of the court to hat case, not only "because it was decided in South Carolina, where he deed was made," but also because it is a case directly in point o sustain our position. It appears in that case that Samuel Thorpe ad two daughters, Martha and Sarah. He gave fourteen negroes to her, the said Martha Thorpe, *and the heirs of her body forever.*" Ie gave fourteen other negroes "to the said Sarah Thorpe, *and the eirs of her body forever*" "But if the said Sarah and Martha Thorpe should die without having a lawful heir of their *body to live,* hen and in that case he gave and devised those slaves above menioned to be equally divided to the survivors." Martha died without issue living at her death, and her husband, Norris, sold some of er fourteen negroes to the defendant, Reynolds. Suit was brought y Sarah and her husbad, Keating, to recover said slaves from leynolds, and the Supreme Court of South Carolina decided that arah and her husband should recover, because, in the language of udge Waites, *"the heirs of her body to live* mean *children,* if they ean anything." So we think in the case at bar that the words heirs of her body which shall survive her," "mean *children,* if hey mean anything."

The decision in 1st Bay, 80, is not at all shaken by the decision n 2d Bay, 471, for "in the *habendum* of this deed (in 2d Bay, 471) he negroes were given to Miss Havens for life, and then *to the heirs f her body,* and in the warranty of this deed, he warrants the neroes to his daughter for life, and *then to the heirs of her body.*"— The majority of the Judges were of opinion that as the *habendum* f a deed is that part of it which declares and limits the use of the hing conveyed, and as the negroes in question are limited in the *haendum* to the heirs of the body of Mrs. Stockton after her death, it reated an estate tail of a chattel which was too remote, and vested he property in the first taker," &c.

In no part either of the deed or will, in the case at bar, are the rords *heirs of her body* ever used except with accompanying words f explanation. And this circumstance strikingly distinguishes this ase of Stockton *vs.* Martin (2 Bay 471) from the case at bar, and hows its total inapplicability. But it may be remarked that the de-

cision in Stockton *vs.* Martin is erroneous in determining that the *habendum* of a deed shall govern the *premises* in such a case. This particular question was ably discussed in the case of Rogers *vs.* Rogers, 3 Wend., 503—which case was briefly as follows:—A devise in these words, "I give, devise and bequeath to my son Thomas Rogers, Jr., for and during his natural life, and the *children* of his body lawfully begotten, after his decease, all that certain, &c., (describing the premises,) to have and to hold the last mentioned premises unto my said son Thomas Rogers, Jr., for and during his natural life, and after his decease to the *heirs* of his body lawfully begotten, and to their heirs and assigns forever." Held to convey to Thomas Rogers, Jr., a life estate only, remainder in fee (the statute turning estates tail into fee) to his children. In this case the *habendum to the heirs* (which would have brought the case within the rule in Shelley's case, and conferred the whole estate upon Thomas Rogers, Jr.,) was construed not to control the premises which devised to the children; and this for two reasons; first, because the *intention* of the testator is clearly that way, and intention must govern where *technical* words are not *uniformly* used; and second, because even in a deed the *habendum* must give way to the premises. Plowden, 153; 4 Cruise 229; 4 Cruise, title *deed*, chapter 20, sec. 77; 2 Cokes Rep. (Buckler's case) 55 a; 4 Cruse, 226.

From these authorities, therefore, it appears very clearly that the case of Stockton *vs.* Martain would have been a case directly in our favor had the point upon which it turned been correctly decided.—And this is also a perfect answer to any objection which has been or may be made, that, in the deed under consideration, the premises are to the heirs of the body surviving, &c., *habendum* to the heias generally; for, if the superadded words are sufficient to show that the words used in the premises mean children, no words in the *habendum* can control that inference.

The doctrine of the foregoing cases is also very distinctly stated in Bacon's Abridgement, Vol. 6, p. 198, where it is said, "testator bequeathed to his wife 'a negro girl named Hannah and my horses, &c., and my plantation and all the lands adjoining to it, during her life time,' held to pass but a life estate in the negro girl,"—citing Black *vs.* Ray, 1 Rev. and Bat., 334.

Also, "a bequest of a slave for life with remainder to the lawful heirs of B., who it appears from the will was alive, is a bequest to

the children of B. and is to be divided among those who shall be *in esse* at the death of the first taker, and is not confined to those born at the death of the testator," citing Simms *vs.* Garrott, 1 Dev. and Bat. Eq., 393.

The leading case in Pennsylvania on this subject is that of the Lessee of Findlay *vs.* Riddle, 3 Binney, 139. In that case the facts were these, viz: John Findlay, the elder, gave a certain tract of land to his son, John Findlay, during his natural life, and after his decease, if he should die leaving lawful issue, TO HIS HEIRS, as tenants in common, and their respective *heirs* and assigns forever. But in case John should die without having lawful issue, then he gave said land to his brother James Findlay, and his *heirs* and assigns forever. After very long and able arguments on both sides, in which all the cases on this subject were cited and commented on, the Supreme Court decided that John Findlay *took only a life estate,* and Mr. Justice Yates, in concluding the opinion of the court, said, "I, therefore, feel myself authorized to construe the word *heirs,* in the first part of the devise, as *children* or *sons and daughters,* and as a mere *designatio personarum.*" See this remark of J. Yates, p. 161.

The same doctrine has been established in Virginia. In the case of Warners *vs.* Mason & wife, 5 Mun., 242, William Warner devised to his son, William, a tract of land "during his natural life, and then to his heirs, lawfully begotten of his body, that is, born at the time of his death, or nine calendar months thereafter," and for want of such heirs, remainder over to his two grandsons, Jacob and George. William Warner, the first taker, dying without heirs, devised the same land to his sister, Mrs. Mason, who took possession thereof. The grandsons, Jacob and George, brought ejectment for the land, and the Supreme Court decided that the words 'heirs of the body lawfully to be begotten, that is born at the time of his death,' &c., were words of purchase and not of limitation. Consequently, it was held that William, the first taker, took only a life estate, and that Jacob and George, the grandsons, took by way of contingent, remainder, William having died without children.

In the case of Higginbotham *vs.* Rucker, 2 Call, 265, it was decided thus: "A man makes a gift of slaves to his daughter and the *heirs of her body,* and in case she died without issue, that is, children of her body, the slaves to return to the grantor. This limitation is not too remote and, therefore, is good."

In the case of Dunn and Wife *vs.* Bray, 1 Call's Reps., 294, the words of the devise are: "I give and bequeath unto my son Winter Bray, one negro boy named Peter, and a negro wench named Dinah, and her increase, to him and his heirs forever; but in case my said son Winter should *die and leave no issue,* THEN I give all the said negroes hereinbefore devised to my said son Winter, to my son Charles and his heirs forever." Held, "that in the present devise the remainder over to Charles (which was clearly intended to take effect upon the death of Winter, without leaving issue living at the time of his death, and not upon a general failure of issue,) is good as an executory devise within the rule" of exception to the rule in Shelley's case. Here the *intention* is made to supply the words, "living at the time of his death," which are not in the will. In the case at bar similar words are inserted, viz: "which shall survive her."

Where the testator bequeathed the improvement of certain personal property to his daughter during her natural life and at her decease to be equally divided among her heirs, it was ruled that by the word *heirs* was intended *children,* and that the legatee took an interest for life in the property with remainder to her children. Ellis *vs.* the Props. Es. M. Bridge, 2 Pick., 243.

2d. But there is another rule laid down by Kent, 4th Vol., 222 for the purpose of determining when the words *heirs of the body,* &c., shall be construed as words of limitation and when of purchase. He expresses it thus:

"If the term heir, as used in the instrument, comprehended the whole class of heirs, and they become entitled, on the death of the ancestor, to the estate, *in the same manner,* and to the same extent and with the same descendible qualities as if the grant or devise had been simply to A. and his heirs, then the word heirs is a word of limitation, and the intention will not control the legal effect of the word."

We shall attempt to show that this property would not, under this grant and will "descend *in the same manner* as if the grant had been simply to A. and her heirs." If this property had been granted or devised simply to A. *and her heirs,* how would it have descended in the event that A. died leaving two children and twelve grandchildren by one of her deceased children? I answer, it would have descended so that the property would have been equally divided into

three parts, of which A.'s two children would have taken two parts, and her twelve grandchildren the other part—the grandchildren taking *per stirpes*. But does the property descend "in the same manner" under the provisions of this deed and devise, supposing the words heirs to have its legal meaning? Certainly not; for it is given "to the heirs of her body which shall survive her, *to be equally divided amongst them;*" now a grandchild comes within the technical meaning of the word *heirs*, in this deed and devise, its technical meaning and carrying into effect the provisions of the devise in the case supposed, we would have to divide this property, not into three, but into fourteen parts, of which each of the heirs, children and grandchildren, would take one part. The grandchildren in this case would take *per capita* and not *per stirpes*, so that it is very clear that the *heirs of* A. would not "become entitled to the estate of their ancestor *in the same manner, and to the same extent, and with the same descendible qualities* as if the grant or devise had been simply to A. and her heirs." Therefore, if Kent be correct, the word *heirs* in this deed and devise *must* be construed not as 'a word of limitation, but a word of purchase.' See 3 Binney, 158, 166.

As to the will in this case, the view here taken is equally applicable as to the deed. The property is loaned to Anner Clardy for life, and "after her decease to return to the heirs of her body, share and share about;" so that the will falls literally within the two rules of exception shewn to control and explain the deed.

We, therefore, conclude that this case is clearly embraced in two of the rules which exempt wills and deeds from the operation of the rule in Shelly's case. The reported cases cited are offered rather to prove the application of these rules to the case at bar, than to prove the existence of those rules, which we contend they do abundantly. These authorities, we think, should be regarded as of more weight than those from England. They are regarded as leading cases, and are from the States of South Carolina, North Carolina, Virginia, Pennsylvania and New York.

It is obvious from the face of these instruments that if the children of Anner Clardy are deprived of this property, it will be in spite of the "clear and unequivocal" intention to the contrary of their grandfather, William Gore.

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BALTZELL, J., delivered the following opinion:

The will and deed under which both parties claim in this case having been made in the State of South Carolina where the testator and grantor lived and where the property at the time was, the laws of that state as administerded by her judicial tribunals must form the rule of its decision. Story's Conflict, 402, 409; 4 Wilson and Shaw, 28, 37.

Referring to them we find that as early as the year 1795 a devise "of negroes to a daughter distinct from her husband during her life and at her death to the heirs of her body," was held to create an estate tail, the words were considered words of limitation and not ged to create an estate tail so as to vest an absolute interest in the daughter. Dott *vs.* Cunn., 1 Bay, 453. In 1833 the terms "I *lend* to my daughter Peggy Starke four negroes, and to another daughter other negroes *during their natural lives, and then to the heirs of their bodies,*" with an appointment of executors of the will "in trust for the intents and purposes therein contained," were likewise adjudged to create an estate tall so as to vest an absolute Interest in the daughter, and that the marital rights of the husband attached giving to his administrator the right of the property after his death.—

Judge O'Neill who delivered the opinion of the court saying "I have struggled to give effect to what I believe the clear intention of the testator that Mrs. Starke should take an estate for life and her children at her death should take as purchasers. But the technical rule is too strong and too well settled that words heirs of the body must be considered words of limitation and not words of purchase and that consequently the estate vests in the first taker." Hinson and Wife *vs.* Picket, 1 Hill, 37. This case is decisive of all the points in the present controversy, the terms *"heirs of the body," "lend,"* and the trust in the will, or tantamount expressions thereto having been all very fully considered. The only difference is in the expressions "share and share about," to be found in the will before this Court, and "hath given to the heirs of her body which shall survive her," and to "be equally divided between her surviving heirs as their exclusive property," in the deed. We have not been able to find a direct adjudication in South Carolina upon these; the nearest approach to it being the case of Stockton *vs.* Martin in which the deed was "to the *daughter during her life and then* to her chil-

dren *share and share* alike, habendum to the daughter for life and the heirs of her body with a warranty to the like effect. The majority of the court held the habendum the controlling part of the deed and adjudged an estate tail so as to give the property to the first taker. 2d Bay, 471.

This case might be regarded as decisive so far as the words "share and share about" are concerned, as they formed a component part of the deed, and if not noticed by the court as material this of itself would be indicative of their opinion as to their immateriality. There is weight too in the fact that no case of recent date has been cited to us of the same court overruling or calling in question its authority, and none coming within our reach we have been strongly inclined to the opinion that it should be held as conclusive. We have not thought proper in a case like the present where a question is raised as to the law of a sister state to inquire into the grounds or reason for a decision made or given by her Courts and to say what they ought to have decided. This would be transcending our powers and assuming an office for which we are by no means disposed to assert our competency—it would be treating a court long distinguished for intelligence and ability with less than the regard justly its due either by courtesy or the rules of law. Our duty is to ascertain the law of that state, by no means to say what it ought to be. The decisions on this subject will, we think, be found in harmony with the English law which they profess to follow as will be seen in numerous cases to which a reference may be given, so that we have less reluctance to give to them all the weight of a decisive authority on the very point in question.

"The terms share and share alike create a tenancy in common." Bunch *vs.* Hurst, 3 Des., 288; Woodgate *vs.* Unwin, 1 Sim., 129; Westcott *vs.* Cady, 5 John. Ch., 334.

In the case of Doe and Candler *vs.* Smith "where a testator devised freehold lands to his daughter and the heirs of her body forever as tenants in common and not as joint tenants and in case of her dying without issue then over, it was held that the daughter took an estate tail." 7 D. & E., 532. So in Pierson *vs.* Vickers, 5 East., 548; Bennett *vs.* Earl Tankville, 19 Vesey, 170; Cole *vs.* Goldsmith, 7 Taunt, 209.

In Jenson *vs.* Wright decided in the House of Lords after full argument (and Lord Eldon said no case was ever better argued at

that bar,) the devise was to W. and after his decease to the heirs of the body of W. in such shares as he should appoint and for want of this then to the heirs of the body of W. *share and share alike as tenants* in common and if but one child the whole to such child, &c., it was held that W. took an estate tail." 2 Bligh., 1.

So in the recent case of Bosnal *vs.* Harvey with like provisions. In Atkinson *vs.* Featherstone, "the devise was to I. and E. his wife for their natural lives, and for the life of the longer liver of them and after the decease of the survivor to the heirs of the body of E. by I. already begotten or to be begotten, to be *equally divided among them, share and share alike,*" it was held an estate tail. 1 Barn. and Ad., 944.

Survivorship is by no means an uncommon form of an estate tail —thus a grant to A. and B. and the survivor and the heirs of such survivor, is of frequent occurrence. "The doctrine of survivorship is the distinguishing incident of title by joint tenancy, and therefore at common law the entire tenancy or estate, upon the death of any of the joint tenants went to the survivors, and so on to the last survivor who took an estate of inheritance." "The common law favored title by joint tenancy by reason of this very right of survivorship." 4 Kent, 360.

We do not intend to convey the idea that in respect to the estate tail, there a uniform entire joint tenancy. On the contrary, it forms an exception to the rule "for inasmuch as the devisees with some exceptions cannot either in fact or contemplation of law have common heirs of their bodies, they are by necessity of reason tenants in common of the estate tail." Co. Litt., 184 a; 2 Vern, 545; Cooper, 777.

"As the reason, however, applies only to the inheritance in tail, and not, to the immediate freehold, the devisees are joint tenants for life with several inheritances in tail, so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitld for life of his share under the joint tenancy and the inheritance in tail descends to the issue if any subject to such estate for life." Jarman on Wills, 158.

Nor is restriction to particular heirs destructive to the estate tail —thus to the heirs male or female—to the first or next heir male. 8 Viner, 234. Such an estate (estate tail) may be created "by an expression denoting an intention to give the devisee an estate of inheritance descendible to his or *some* of his *lineal*, but not to his col-

lateral heirs which is the characteristic of an estate tail as distinguished from a fee simple. 2 Jarman on Wills, 232.

The term "surviving heirs' is one of unusual occurrence in the books, for whilst we have "survivors," "surviving children" "sons" "issue" and "daughters," there is in the books no such word attached to heirs as far as we have been able to discover, and we are inclined to the opinion that so connected, it is without meaning, neither enlarging nor contracting the estate. The heirs of Mrs. Clardy from necessity are those who survive her at her death—they could not have preceded her. *Nemo est haeries viventis.* There is no heir until the death of the ancestor. The fair import of the clause then would seem to be that the estate is to go to the heirs of her body at her decease. If this view be correct the case is freed from difficulty, and the deed is a naked grant to the heirs of the body.

It may however be more satisfactory supposing that we are mistaken in this respect, to consider how far words superadded to the term heirs of the body, change the character of the devise and whether by possibility this word "surviving" may produce this effect. It seems that "if the superadded words of limitation operate to change the course of descent, they will convert the words on which they are grafted into words of purchase." Jarman, 276.

It is not to be inferred that the words heirs of the body, are incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used these words in some other than their ordinary acceptation, and as descriptive of another class of objects. Some of the examples given of words producing this change are of a devise to a first, second, third and every other *son* of B. and the heirs of the body of such, first, second, &c., son.

Love *vs.* Daviers, 2 Ld. Ray., 1561. To the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E., and so to all and every other, the heirs male of the body of E., and to the heirs male of their body according to seniority of age.

Lisle *vs.* Gray, 2 Lev., 263. These cases it is said leave no doubt of the design of the testator and we conceive do not. 2 Jarman, 302.

The cases bearing the nearest analogy to the present are to this effect. A person devised to his three daughters to be equally divided, and if any of them died before the other then the one to be

the other's heir equally to be divided, and if his three daughters died without issue then over, adjudged that his daughters took an estate tail. King *vs.* Rumbal, Cro. Ja., 448.

In Richards *vs.* Lady Bergaviney, the devise was to the Lady Bergaviney, and such heir of her body as shall be living at her death with remainder over, and it was adjudged an estate tail. 2 Vernon, 324.

A devise to W. for life, and after his decease to the use of the heirs, male, of the body of W., lawfully begotten, severally, respectively, and in remainder the one after the other, as they and every of them shall be in seniority of age, and priority of birth, gave W. an estate tail. Lord Thurlow said where the estate is so given that it is to go to *every person who can claim as heir to the first taker, the word heirs must be a word of limitation.* All heirs *taking as heirs* must take by descent. Jones *vs.* Morgan, 1 B. C. C., 206.

Now it is not perceived that the word "surviving" clearly demonstrates that the testator used it and the word *heirs of the body* in some other than the ordinary acceptation of the latter expression, and as descriptive of another class of objects. It is clear that it is not embraced within any of the cases which have been held to alter the rule. Obviously those who take as surviving heirs claim as heirs to the mother at her death, and taking as heirs they take by descent. According to our view the property would descend to the whole class of heirs of Mrs. Clardy, and they would become entitled to the estate in same manner, and to the same extent, and with the same descendible qualities as if the grant had been simply to her and her heirs. 4 Kent, 222.

It is scarcely necessary to quote authority to the effect that where personal estate is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and it is immaterial whether the bequest itself contain the words of limitation or refer to a devise of realty creating an estate tail. 2 Jarman on Wills, 492; 1 Beav., 150.

We have been asked to consider this question as a new one, and and as if the cases of Doe & Laning, Doe & Goff, and a few others asserting a doctrine contrary to those cited to sustain the rule in Shelley's case still continued to be authority in the English Courts. It has been insisted that these cases have not been overruled, and are quite reconcilable with the latter authorities; but we think dif-

ferently. That great jurist the late Chancelllor Kent, than whom no one could speak with greater truth and propriety on this subject says: "The rule in Shelley's case survived all the rude assaults which it received in the controversy under Perrin & Blake, and it has continued down to the present time in full vigor with commanding authority, and with its roots struck immovably deep in the foundations of the English law. All the modern cases contain one uniform language, and declare that the words heirs of the body, whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party."

An English author of whose recent production the present Chief Baron of the Exchequer has spoken "as a very learned work," after noticing the case of Perrin and Blake, says: "since this solemn determination the rule in question, has been regarded as one of the most firmly established rules of property, and strictly speaking no instance can be adduced of a departure from it." 2 Jarm., 243; 14 M. & W., 706.

The same author says, after speaking of the various cases opposed to Doe *vs.* Laming, "we may then reasonably hope never to hear the case of Doe *vs.* Laming again cited as an authority in a court of law." 2 Jarm., 288.

In Jessen *vs.* Wright, Lord Redesdale said: "It is impossible to decide this case without holding that Doe *vs.* Goff is not law." 2 Jarm., 292.

It is said: "if the children of Anner Clardy are deprived of this property it will be in spite of the clear and unequivocal intention to the contrary of their grandfather, William Gore." To language of this kind we would oppose the forcible remarks of the Supreme Court of South Carolina in the case of Carr *vs.* Porter, with this additional observation, that after an acquiescence by the people of that State for upwards of fifty years in a law as announced by her courts, it is rather too late to call in question its propriety. The reply to such remark is best made in the language of the court responsible for the result to which we have arrived. They condemn with great force and propriety the idea of a Judge making a decision according to his own views of the intention of a testator.—"Wherever a construction has been given by a competent tribunal to any form of words, such decision has always been held obligato-

ry on all succeeding Judges in cases of wills as in any other cases. Fearne speaking of the notion that we must lay aside all precedent in the construction of wills, and that a Judge must be governed by his own views, says, 'such a mode of construing wills, if ever fully established, would open an almost unlimited power to the Judge of disposing of the property of testators, and diverting the circulation of it to his own mind.' If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times, &c., I should be glad to know what person would venture to purchase an estate without first having the judgment of a Court of justice respecting the identical title which he means to purchase." 1 McCord, 71.

After the most mature consideration we are of opinion that the court below erred in giving judgment for the defendant. It should, in our opinion have been for plaintiff on the special verdict.

BAILEY *vs.* CLARDY.

BALTZELL, Justice:

This case is in effect decided by the opinion just delivered in the case of Watts, administrator, &c., *vs.* Clardy, and for the reasons given therein must be reversed, with directions to the Circuit Court to dismiss the bill, and dissolve the injunction of complainant.

JOHN W. SIMONTON, *vs.* PEDRO A. GANDOLFO.

Where the mortgage of real estate covered by a mortgage conveys to a purchaser, and the purchaser to complete his title procures the mortgagee to release to mortgagor, and promises in consideration of such release to pay a given sum to the mortgagee, Held:

That such promise need not be in writing.

Appeal from Monroe Circuit Court.

The plaintiff brought assumpsit against defendant, and in his declaration sets forth substantially, that on the 15th of January, 1847,

John W. Simonton, vs. Pedro A. Gandolfo.

one Fielding A. Brown was possessed of certain lots in Key West by deed from one John Barcroft, trustee of the plaintiff, and that Barcroft as trustee held a lien on the same by mortgage executed by Brown for the purchase money. That Brown conveyed parts of two of said lots (4 and 5 in Whitehead's plan of said city) to defendant. That defendant agreed with plaintiff to pay him six hundred dollars upon the execution by plaintiff of a release to said Brown and his assigns of all claims or demands which said Barcroft, trustee as aforesaid, had "against said Brown as mortgagor as aforesaid for and on account of the said mortgage," and that the plaintiff on the 16th of April, 1847, executed the release.

The defendant demurred to the declaration on the ground that the assumpsit should have been in *writing*, and also so alleged in the declaration.

The demurrer was sustained in the court below and judgment entered on 22d November, 1847, for defendant.

Mr. Towle, for Appellant:

Two points are raised by the demurrer:

First. Is the contract declared on one within the statute of Fraud and void because not in writing:

Second. Could the defendant *demur* for the reason that no copy was given, and that declaration did not state that it was in writing.

I. To answer the second point first: Admitting the contract within Statute Frauds, (Duv. 206) yet the demurrer is not sustainable.

1. No copy of the cause of action is required to be filed. This case does not come under any of those mentioned in Duval, 96, Sec. 35. If required, the remedy is not by demurrer—the defendant should apply for a rule.

2. The declaration need not have stated the contract to be in writing. (Salk. 519 anon.) The plaintiff was not bound to anticipate objections which might be raised by defendant. 1 Ch. Pl. 222.

3. The demurrer is defective—in not being based upon matter appearing *on the record*. It assumes a fact, which the declaration nowhere states—to wit: that the contract was parol.

II. The contract was not within the Statute of Frauds.

1. The contract was not about LAND. The thing released is a *debt* due by F. A. Brown—not land. Though the mortgage created a lien on the land, still that is only an incident, and THAT is con-

sidered as personalty going to the executor and not the heir. Releasing the debt extinguishes the mortgage and no reconveyance is necessary. 4 Kent's Com., 193 and 194 in notes, 5th edition.

Again, the releasor was not even the mortgagee, but a *cestui que trust* who had no claim whatever upon the land but an equitable claim on the money and its income, &c.

2. It was not a *"sale"* which was contracted for. *Sale* implies a *transfer over*. Here was none, but a mere cancellation—extinguishment.

3. This contract is not within *our* statute of Frauds though it may be within the English statute. There is a very important difference between them. Our statute does not like the English avoid a *contract or sale*, but only a "contract for the sale." The foundation of the present action is not a "contract" to sell or to do any other thing *in futuro*, but a sale or release executed and complete.

4. It is not within even the English Statute. A "contract or sale" (to use the words of the statute,) which is executed or even party executed, is not void for want of a writing. Clarke *vs.* Vankirk, 14 Serg. & Rawl., 354; Teal *vs.* Anty, 4 Moore, 547; 2 Broderip & Bingham, 99; Hoby *vs.* Roebuck, 7 Taunt., 157; 3 Barn. & Ad., 899; Wilbur *vs.* Paine, 1 Ham., Ohio R., 251; Pomeroy *vs.* Winship, 12 Mass., 523; Chapman *vs.* Allen, Kirby, Conn. R., 400; Davenport *vs.* Mason, 15 Mass. R., 82-89; Crosby *vs.* Wadsworth, 6 East., 602; Miller *vs.* Hower, 2 Rawl., Penn. R., 53; Jones *vs.* Peterman, 3 Serg. & Rawl., 543; 2 Marsh., 433; Parkhurst *vs.* Van Courtland, 14 John. R., 15.

Carmack & Baker, for Appellee:

This is an action of assumpsit on a parol promise for the purchase of an interest in land, that is to say: the relinquishment of a mortgage held by the trustee of the plaintiff.

1st. As no written promise is declared on, or set out in the declaration, or copy of such writing given as required by the act of Legislature, Duv., 96, Sec. 35; it results that the declaration is upon a verbal promise.

2d. By the act regulating conveyancing, Duv., 206, Sec. 10, it is provided that no action shall be brought to charge any person for the sale of land, or of any uncertain interest in or concerning them, unless the agreement or promise upon which such action shall be

brought, or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith. See also sec. 1, of this act. Its phraseology imparts light as to construction of sec. 10.

Sec. 4. Stat. 29, Charles 2, which is in force here, uses the words, "or upon any contract or sale of lands, &c., or any interest in or concerning them." Rob. on Frauds, Append., 468.

If no action shall be brought none can be maintained.

A release or any agreement to discharge a mortgage is embraced by the statute.

A release according to Blackstone is the conveyance of a man's rights in land. 2 Bl., 324; Litt., 445, 465-6; 1 Inst., 264, 267; Am. Com. L. Title St. Frauds; Day's Digest; Kain *vs.* Sanger, 14 John., 89; Jackson, ex dem., Bain *vs.* Talver, 8 John., 370.

BALTZELL, J., delivered the following opinion:

The defendant Gandolo demurred in the court below to the declaration of the plaintiff, assigning the following special grounds:

1st. "That the assumpsit declared on should have been in writing and so stated in the declaration."

2d. "A parol promise respecting the sale of lands is illegal and cannot be enforced in a court of law." Judgment on the demurrer having been for defendant the plaintiff has appealed to his court.

We do not regard the agreement as set forth to be within the statute of Frauds. Mortgages are not considered as conveyances of lands within the statute. 2 Burr., 969; 1 Pow. Mortg., 144.

In Massachusetts where it is held that the equity of redemption may not be transferred by parol, an action was maintained by the grantor against the grantee to recover the consideration acknowledged in the deed to have been paid. The Court saying "it is not a contract for the sale of lands, that contract was executed and finished by the deed. This is only a demand for money arising out of that contract." Scott *vs.* McFarland, 13 Mass., 311; Wilkinson *vs.* Scott, 17 Mass., 249.

In Hess *vs.* Fox. Executor of Fox, plaintiff declared on a special agreement to this effect, that plaintiff being indebted to Fox the testator in the sum of $400 secured by mortgage, it was agreed that plaintiff should convey the premises by absolute deed, and deliver them to Fox, and he should discharge plaintiff from the debt of $100,

and sell the premises at the best price, and pay over to plaintiff any surplus over the $400. This was insisted to be void within the statute of frauds. The court say after reciting the statute which is substantially the same as ours, "the meaning is that no interest in land shall pass otherwise than by deed or writing," and they held the agreement not within the statute but valid and binding. 10 Wend., 439, 440.

Now in that case the agreement was to the benefit of the mortgagor, in this it is the mortgagee that asks the aid of the court in his behalf. The principle we regard as the same, the statute not operating in the one case we cannot see how it can be made to bear in the other. There is another difference. Gandolfo is the assignee of the mortgagor, having purchased a portion of the lots. In reference to these he occupies the same position to the mortgagee as the original mortgagor, with the exception that he is not liable to judgment on the notes originally given. As assignee, however, a suit for foreclosure would properly be maintainable against him, and a decree for the sale of the lots be had against him. We then see that he had a direct and fixed interest of his own in the discharge of the mortgage. There was express benefit and advantage to him, and injury to the plaintiff in parting with the security of the mortgage by the release given, thus making an original independent promise in his behalf. 2 Peter's. S. C. R., 182; 5 Bing., 464.

A different result could not well be arrived at without holding the release of the mortgage void and the lots held by Gandolfo subject to the incumbrance. It is scarcely consistent with right, that he shall have the advantage and benefit of the release, and keep the money also which he was to pay the mortgagee for it.

The judgment of the court below will be reversed and the cause remanded with directions to overrule the demurrer of defendant to the plaintiffs declaration, and for further proceedings to be had therein agreeably to the principles of law.

Executor of Jesse H. Willis, *vs.* John S. Shepard.

A judgment in favor of one execution creditor of an estate upon a rule against another execution creditor of the estate, determining the right of the parties to moneys in the hands of the Sheriff is irregular, such mode of proceeding not being authorized by Common Law or Statute.

The proper course in such case is for each execution creditor to take his rule against the Sheriff.

Appeal from Leon Circuit Court.

Jesse H. Willis, plaintiff, in an execution against the executors of Alfred M. Gatlin, upon motion, obtained a rule in the Leon Circuit Court, against Alfred A. Fisher, Sheriff, John S. Shepard, assignee of the Union Bank of Florida, and William D. Moseley, plaintiffs in other executions in the same court, against the executors of Gatlin, to show cause *instanter*, why the said Sheriff should not pay over to the attorneys of the said Willis, certain moneys arising from a sale of slaves made by virtue of sundry executions against Gatlin's estate, including the execution in favor of Willis.

It does not appear what answers were made by the defendants to the rule, except that according to the bill of exceptions, the Sheriff at the hearing made a return of all the executions under which the sale was made, and of the levies and sales, &c., and that testimony was taken to prove various facts deemed important, and that other facts were admitted and entered by consent in the bill of exceptions.

The following entry of the final decision in the court below appears in the record:—

"Upon hearing the several parties in interest and claiming the proceeds of the said sale of the first Monday in December last: It is ordered, that the sum of four hundred and five dollars, the proceed of the sale of Ben Tillet be deducted from the amount in the Registry of the court, and that the residue of said sum, be distributed *pro rata* amongst and upon the execution in favor of said Willis, numbered 2981, and the executions numbered 2982, 2983, and 2984, in favor of the Union Bank of Florida, and the execution numbered 2985, in favor of William D. Moseley; the execution numbered 2887 in favor of the said Union Bank of Florida, upon

which John S. Shepard, the assignee, ordered a stay of execution, being considered as dormant, the stay thus ordered operating as a waiver and relinquishment of all the levies made under it, except that of the 7th of October, 1844, which has been otherwise disposed of. And the said Jesse H. Willis, by his attorney, prayed an appeal from the foregoing order, to the Supreme Court, which is granted; and the said John S. Shepard, by his attorney, also prayed a cross appeal therefrom, in case said appeal of the said Jesse H. Willis, shall be prosecuted by him, to the end that the questions be decided by the Supreme Court: First, Whether his execution, numbered 2887, is not entitled to the whole of the moneys in controversy. And, second, Whether if it be not entitled to the whole it is not entitled to a *pro rata* portion thereof, with all the other executions, which is also granted, and by consent of parties, bond and security is dispensed with on said appeals respectively, and by consent of parties, it is further ordered, that these several orders be entered as of the 20th day of November last."

"THOMAS DOUGLAS, *Judge.*"

Thompson & Hagner, for Appellants.

Long & Walker, for Appellee.

BALTZELL, J., delivered the following opinion:

We have not been able to decide the important question presented to us in the argument of counsel, upon any rule or principle of law satisfactory to ourselves. The case in this court is between Willis's executor, appellant, and Shepard appellee, and there is also a cross appeal. In the court below it was entitled, Willis against Gatlin's executors, and was commenced by rule as well against Shepard as the Sheriff and Moseley, ordering them to appear and show cause why the Sheriff should not pay over to Willis's attorneys moneys arising from sale of certain slaves, &c. To this there was no answer by any one. The trial seems to have progressed between Shepard and Willis until finally an order was passed for "the distribution of the residue after deducting $405 the proceeeds of sale of a negro *from the amount in the registry of the court.*" Now we are not aware of any such mode of proceeding at common law or by statute as a rule between two individuals to try the right of money

in the hands of a third person, the Sheriff. There is no statute authorizing it that we are aware of, and by the common law and a special rule of the court also, a rule by way of attachment for contempt, was allowed against an officer to compel the payment of money when collected under execution. But the jurisdiction is against the officer, and the authority is ample to compel obedience to the order of the court. But where is the jurisdiction or authority for a rule of this kind between private individuals? Suppose a judgment in the present case in favor of one or the other parties, how is it to operate? Can it enforce obedience? Neither of the parties has the money, and the Sheriff is not a party, nor does it appear from the record that he has the money in his possession. To whom would the order be directed? We see a difficulty in the order of the court below to that effect—it is directed to no one.

But there is another objection to the present mode of proceeding. Shepard is defendant in the rule, and required to shew cause why the money should not be paid to Willis. He prefers no claim of his own, and according to legal principles no judgment could be given in his favor, yet in this court and the court below he claims, and is allowed, a share in the distribution. The proper course, in our opinion, is for such claimant to take his rule against the Sheriff—the allowance of one will be the refusal of the others. By an order of consolidation all can be tried together, and in case of appeal by any, the stay of the others may be had as directed until final decision.

Inn Blewitt *vs.* Nicholson, an application of a like character to decide questions raised in argument, and not by the case in the record was considered by the court, and deniend after mature consideration. We see no reason to change the determination then expressed. It is not matter of mere form, but of substance. We consider it by far safer and more prudent, more in the spirit of the constitution, and in harmony with the character of our institutions to keep within the range and limits of a rightful jurisdiction than to subject ourselves to the reproach of traveling beyond it, and exercising a doubtful and questionable power.

We are therefore of opinion that the order of the court below be reversed and set aside, and this cause remanded for proceedings not inconsistent with this opinion.

THOMAS HARRIS AND LUKE MOORE *vs.* A. H. COLE.

An appeal is the only proper method whereby to bring up a degree in Chancery to this Court, for review and revision. A *Writ of Error* will not lie in such case.

Writ of Error to Circuit Court for Columbia county, to reverse a decree in Chancery.

Mr. McCants, for Plaintiff in Error.

Mr. Hagner, for Defendant in Error.

DOUGLAS, Ch. J., delivered the following opinion:

This is a suit in Chancery which was brought up from the Circuit Court of Columbia county by a writ of error, and a motion is now made on behalf of the defendant to dismiss it, on the ground that a writ of error will not lie in such a case.

This is the same ground upon which the case of Richard Bradford, administrator of Leigh Read, deceased, *vs.* Wm. Marvin and N. M. Martin, was dismissed on a former day of the present term of this court, and the motion must therefore prevail for the reasons assigned in that case, to which however we deem it proper to add another, not then adverted to, but which we consider material, viz: The difference between the object and purpose of a writ of error and an appeal.

The object of a writ of error is to review and correct an error of law, which is not amendable or cured at common law, by some of the statutes of amendment and jeofails. 3 Bl. Comm., 405; 1 Bac. Abr. title Error; 2 Saunders,46, note 6; Graham's Pr. B., 4; 1 Tidd's Pr. Chap., 43.

Tomlin in his Law Dict., 647, says "The writ of error only lies upon matter of law arising on the face of the proceedings, so that no evidence is required to substantiate or support it," and Bro. P. C., 515 is cited.

"The writ lies (says Viner) when a man is grieved by any error in the foundation, proceedings, judgment or execution, and thereupon it is called *"breve de errore corrigendo."* 9 Viner's Abr., 473, letter A., title Error.

Thomas Harris and Luke Moore vs. A. H. Cole.

An appeal is defined to be the removal of a cause from the sentennce of an inferior to a superior Judge. The United States *vs.* Wonson, Jun., 1 Gallison's Rep., 13; or as Blackstone has expressed it, 4 Comm., 312: "A complaint to a Superior Court of an injustice done by an inferior one." Its object is to review the whole case upon its merits. An nappeal differs from proceedings in error under which the errors alleged to have been committed in the proceedings are examined, and if any have been committed the first judgment is reversed because in the appeal, the whole case is examined and tried as if it had not been tried before. 1 Bourvier's L. Dict., 114; Sergeant's Const. law article, upon courts of the United States, page, 50; Conn. *vs.* Penn, 5 Wheat. Reps., 424.

Of course we do not here allude to the appeal in cases at law provided for by our statute. (Thompson's Digest, 446; Duval's Comp., 108,) which it has uniformly been held only to bring up the errors in the proceeding, in the same manner as would a writ of error. And so Mr. Justice Story held under a statute of Masaschusetts similar to ours, on that subject above cited. After an able review of the question in which he refers to the various statutes of that State, relating to the matter, and to numerous authorities he says: "I am clearly of opinion that an appeal in a common law suit from a District Court removes error of law only, for the consideration of this (Circuit) Court."

Our remarks are intended to shew that according to our view of the law, an appeal is the only proper method whereby to bring up a decree in Chancery to this court, for review and revision, and when thus brought up, the whole case is before the court for that purpose.

In the case of Anderson and Thompson *vs.* Biddle, 9 Missouri Rep., 580, it was expressly ruled that "a writ of error will not lie to a decree in Chancery."

The motion is therefore sustained and the case dismissed.

Per Curiam.

JANUARY TERM, 1849.

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

JANUARY TERM, 1849

By DAVID P. HOGUE, Reporter.

TALLAHASSEE
OFFICE OF THE FLORIDA SENTINEL:
PRINTED BY JOSEPH CLISBY.

1849.

Entered according to Act of Congress, in the year of our Lord 1849,

BY DAVID P. HOGUE,

In the Clerk's Office of the United States District Court for the Northern District of Florida.

JUDGES

OF THE

SUPREME COURT OF FLORIDA

DURING THE PERIOD OF THESE REPORTS.

Hon. THOMAS DOUGLAS, Chief Justice.

Hon. GEORGE S. HAWKINS,
Hon. THOMAS BALTZELL,
Hon. J. B. LANCASTER,
} Associate Justices.

DAVID P. HOGUE, Attorney General.

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THE DECISIONS

OF THE

SUPREME COURT OF THE STATE OF FLORIDA,

AT

JANUARY TERM, 1849.

'HARD H. LONG, PLAINTIFF IN ERROR, *vs.* BENJAMIN F. ALLEN, USE, &C., DEFENDANT IN ERROR.

In action upon a note given to secure the payment of the purchase money of lands, an equity existing in a third person is not sufficient to sustain a plea of failure of consideration.

Mere equity in another person is no defence at law, in an action brought to recover the purchase money. There must be fraud or eviction or something equivalent thereto; or admitted or unquestionable paramount title.

When the vendor of land has a patent from the United States, and the payment of the purchase money is resisted on the ground that there is an outstanding title in another person, evidenced by a receipt given to such other person by the Receiver of the Land Office, the defence is not such a one as can be set up in a court of law against the person holding and exhibiting the patent, and who is seeking to recover on a note given by the purchaser. Especially will a court not be inclined to admit such a defence, where it appears that, at the time of the purchase, the purchaser had knowledge of the existence of the claim so set up.

Bond or covenant constitutes a good and valuable consideration for a note given upon a sale of lands; and a want or failure of title is no defence to an action on the note.

Court of law, though the proper tribunal to try the title to land, will not try such title collaterally.

This case was brought up by writ of error from Jackson Circuit Court. The action, which was assumpsit, was brought by Allen as administrator of Richard C. Allen, deceased, for the use of the Kentucky Asylum for teaching the deaf and dumb, and was founded upon a note given by Richard H. Long, the plaintiff in error, to the said Richard C. Allen in his life time, and which, it was admitted, was

given to secure the purchase money for the northwest quarter of section twenty-two, in township five, of range ten, north and west, purchased from Allen, as the agent of the Deaf and Dumb Asylum of Kentucky.

The cause was tried before Judge MAGRAE, at the Fall Term of Jackson Circuit Court, 1846.

The defendant in the court below and the plaintiff in error here, pleaded *non assumpsit*, and a failure of consideration and want of title in the Deaf and Dumb Asylum.

To rebut the plea of a failure of consideration and want of title in the Deaf and Dumb Asylum, the plaintiff below offered in evidence the original patent for the land sold, signed by John Q. Adams, President of the United States, and dated on the 31st day of July, 182[illegible], conveying the absolute title to the Asylum. The plaintiff also proved upon the trial that defendant went into possession of the land, and that he has always remained in the quiet enjoyment of the same.

The defendant, to supoprt his plea of failure of consideration *and* want of title, offered in evidence a receipt signed by R. K. Call, *Receiver* of the Land Office at Tallahassee, dated January 1, 182[illegible], given to Charles Wiliamson, assignee of William T. Kilbee, for a sum of money paid by him for the identical land sold by Allen to defendant. This receipt of the Receiver of the Land Office was offered for the purpose of showing that the title to the land was outstanding and in another person, to wit: in Charles Williamson. The defendant moved the court to instruct the jury, that the receipt was evidence of title to the land in Williamson, which was received; and the court instructed the jury, that the receipt was not evidence of title against the patent.

Defendant moved the court to instruct the jury, that it was competent for them to inquire and decide from the evidence offered by said receipt and patent, whether the United States had not parted with the title to said land, before the grant of the patent—and if so, wheher the patent was not void, so that the plaintiff could not make a good title to defendant—which instruction the court refused, and charged the jury that it was not competent for a court of law to inquire into the validity of the patent in the mode proposed.

Defendant prayed the court to instruct the jury, that, under his replication, the plaintiff was bound to prove that the Kentucky Asylum was authorized, by its act of incorporation, to sell and convey

real estate belonging to it, and that, having failed to do so, the defendant was entitled to a verdict—which instruction the court also refused to give, but charged that the plaintiff was entitled to a verdict upon the evidence.

The bill of exceptions shows that the defendant adduced in evidence a paper which was called a title bond, given by R. C. Allen, for the Asylum, containing a covenant to make good and sufficient legal conveyance, upon payment of the note given by defendant.

The court in this case instructed the jury generally, that, whatever might be the law in regard to the validity and force of the papers submitted by the defendant, there being no other evidence to show fraud or mistake in the rendition and execution of the patent exhibited, the latter was conclusive in law as to the title of the plaintiff, and that the same having been tendered to the defendant as evidence of title, the latter could not at law, upon the evidence in this case, avoid the payment of the note sued on.

To all which opinions and instructions, the defendant below excepted; and by his counsel assigned for error in this court the instructions so given and refused.

Carmack, Stephens & Baker, for Plaintiff in Error.

The question presented by the assignment of error is, whether the plaintiff in error, Long, was not under the proof entitled to a verdict, on the ground that the title to the land purchased was not in the Asylum, but in Williamson, assignee of Kilbee.

1. Under the contract with the Kentucky Asylum, Long had a right to insist upon a title clear from suspicion. 1 Eng. Com. Law, case of Maberly *vs.* Robins, 214. 12 Johns., 247. 4 Taunton, 334.

A contract to make and execute "a good and sufficient deed to convey title is not performed unless a *good* title passes by the deed." Chitty on Cont., p. 729—note 1.

The party must be able to convey such a title as the other party has a right to expect. Idem.

2. Had the Kentucky Asylum a clear title to the land purchased by Long?

The evidence in the case proves that, before the patent under which the Kentucky Asylum claims, was obtained, a certificate for the same land was issued to Williamson.

It is admitted that, in an action at law between the patentee and

the tenant in possession who holds against the patent, the patent is conclusive of title. See Bagwell *vs.* Broderick, 13 Peters, 436. But it appears from the same case, that those who claim against the patent may file a bill in equity, and show that the patent issued by *mistake*—a court of equity being the forum in which the equities of the parties may be investigated. Williamson, then, as assignee of Kilbee, may, at any time, file a bill in equity against the Kentucky Asylum and those claiming under it, and upon showing that the patent issued by mistake, procure a patent himself for the same land—which patent, when obtained, (though younger than that held by the Kentucky Asylum,) would by relation take effect from the date of the entry, and thereby prove a prior *legal title.* Taylor & Quarles *vs.* Brown, 2 Cond. R., 243.

Chief Justice Marshall, who delivers the opinion of the court in the case above cited, says: "The principle on which relief is granted is, that the patent, which is the consummation of title, does in equity relate to the inception of title, and therefore in a court of equity, the person who has first appropriated the land in contest, has the best legal title, unless his equity is impaired by the circumstances of the case.

If this be true, as soon as Williamson shall have successfully asserted his title in a court of Equity, Long, or any other person who takes possession under the patent of the Kentucky Asylum, may be evicted. It depends, then, upon Williamson, whether Long shall have the land or not. If the title fail, it cannot be material to Long, whether Williamson causes it to fail, by going into a court of equity, or waiting for a patent and proceeding in a court of law. Let him adopt either course, the consideration fails, and the plea is sustained.

3. That the court was bound to notice equitable objections to the title. See Elliott *vs.* Edwards, 3 Bos. & Pull., 181. Maberly *vs.* Robins, 5 Taunt., 625.

4. It is no answer to say, that the bond for title was taken by Long, or tendered him by the Asylum; for when a note is given for the price of land, and the title fails, this is a good defence to an action on the note. Frisbee *vs.* Hofingale, 11 John. R., 50.

C. H. Dupont, for Defendant in Eror:

The defence set up by the defendant below, was that the Deaf and Dumb Asylum of Kentucky had not a valid title to the land, and could

not comply with the contract to make a good title to the defendant; and to support this defence, the defendant sought to give in evidence proof of an "entry" of the said tract of land in the office of the Register at Tallahassee, by another person in 1827.

The plaintiff to sustain the allegation contained in his replication, viz: that the Deaf and Dumb Asylum was prepared to convey to the defendant a good title, upon the payment of the purchase money, offered in evidence the patent of the government, conveying the said tract of land in fee to the said Deaf and Dumb Asylum. Upon this state of the case, the defendant in error assumes the following positions, to-wit:

I. In an action at law, the "patent" from the United States for part of the public lands is conclusive as to title. Bagwell *vs.* Broderick, 13 Peters, 436. McArthur *vs.* Browder, 4 Wheat., 488. 4 Con. Rep., 517.

II. The patent is the foundation and completion of the title, and establishes in a court of law the performance of every prerequisite, and no inquiry into the preliminary measures which ought to precede it, can be raised in a trial at law. McArthur *vs.* Browder, 4 Wheat., 488. 4 Con. R. 517. Stringer *vs.* lessee of Young, 3 Peters, 337.

It may be proper to remark, that the cases cited to sustain the foregoing propositions, were actions of ejectment, but I think that the following corollary may be legitimately deduced therefrom, to-wit: If in an action of ejectment, when "title" constitutes the primary question, the validity of a patent from the government may not be impeached, much less will it be tolerated, when the question of "title" is only incidentally involved, as in the case at bar.

III. In an action of assumpsit to recover money deposited upon a purchase of real estate, upon an allegation that the defendant has failed to make a proper title, the court will not consider whether the title is of a doubtful description, (such as a court of equity would not compel an unwilling purchaser to take,) but simply whether the vendor has or has not a legal title to convey. Bayman *vs.* Gutch, 7 Bingham R., 379. 20 En. C. L. R., 170.

IV. The vendee of real estate cannot avoid the payment of the purchase money by alleging a want of title in the vendor, so long as he retains possession of the premises sold. Archer *vs.* Bamford, 3 Starkie R., 175. 14 En. C. L. R., 176-'8.

V. The possession of the patents of the United States is conclusive evidence of a title in the Kentucky Asylum to convey, and the validity of the same, as against any muniment of title less than a patent, can be inquired of only in a court of equity. Bagwell *vs.* Broderick, 13 Peters, 436.

Opinion by Justice BALTZELL.

This is a suit on a promissory note, payable at the Union Bank of Florida, given for the purchase of a tract of land, and the defence is a failure of consideration, based upon an equitable right in a third person. The case was tried upon the evidence, without reference to the pleadings, the court instructing the jury as to the points presented. The propriety of these instructions is now raised in this court. The error assigned presents the main question in the case—that under the proof defendant was entitled to a verdict, on the ground that the title to the land purchased was not in the Asylum, but in Williamson, assignee of Kilbee. Strictly speaking the instructions might have been refused, on the ground that the title was not as asserted but in the Asylum obviously, through the patent of the United States, which they held and tendered in evidence. The more appropriate question is, whether through the equity existing in Wiliamson, the defendant could maintain his plea of a failure on that account. To solve this question we must refer to the bond taken by defendant, on executing his note. This formed the consideration for it, and to the extent of the covenant contained in it, plaintiff is bound, and no further—it not being pretended that there was fraud in any respect. The covenant there is to make "good and sufficient legal conveyance, upon the payment and full discharge of the said promissory note." We do not consider it necessary, on the present occasion, to determine the relative effect of these arguments, whether they are dependent or independent—the point has not been argued before us, and the case may be decided upon other grounds, admitting, in our opinion, of neither doubt nor question.

In argument, and on the trial in the Circuit Court, the case was treated as if there had been a covenant for good and sufficient title—a covenant in the opinion of at least two of the most enlightened courts in the Union, of very different import from that of a sufficient deed of conveyance. The words, "good and sufficient deed," have no reference to the title; "It is a covenant relating merely to the va-

lidity and sufficiency of the conveyance in point of law to pass whatever right the plaintiff had in the lands to the defendant." "It is impossible," says C. J. Spencer, in a case reviewing the decisions in New York in this respect, "to torture the covenant to give a good warrantee deed of conveyance to mean that he will give a good title." 20 John., p. 132. 12 John., 436. 13 John., 350. 16 John., 268. 6 Cowen, 21-2. 15 Pickering, 553.

Even this question seems to be unsettled in the American Courts, the Supreme Court of Pennsylvania holding the adverse doctrine; nor do we design to express a positive opinion on the present occasion.

In the case under consideration, we find the plaintiff in possession of the patent of the United States, granted in July, 1829, nearly twenty years since, and during that long period it has not been assailed. The defence set up under Williamson is, in the pleadings, alleged to be a claim—not even a subsisting, or a good and valid one. At the best it is a mere equity—dormant from its existence in 1827, and never asserted in court or elsewhere, as appears from the record, to the present time. It has not disturbed the defendant's possession obtained under the purchase from the Asylum and which he has held for several years, nor is there an allegation that there is any fear of its disturbance, or that there is a design to assert the claim to his injury. Admitting that Williamson might, in a court of equity, have obtained his right over the patent and compelled a conveyance of the land, yet it by no means follows that the defence would be available to defendant here. But in addition to all this, by the plea in the case, this very claim of Williamson was known to defendant at the time of his purchase. Under such circumstances, to hold the defence available, would be going far beyond the decisions of any of the courts that have permitted objections of this character. The cases on the subject in the American Courts are based on the ground of fraud or eviction, or that which is equivalent, or of admitted or unquestionable paramount title. The general rule at common law, and that now prevailing, is that the bond or covenant constitutes a good and valuable consideration for the note, and, of course, a want or failure of title would be no defence to an action on the note. 1 Greenleaf, p. 352. 2 Wheat., p. 13. If there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title." 3 Kent, 473.

The case of Frisbee *v.* Hoffnagle, cited by defendant's counsel, 11th Johnson, p. 50, asserting a different rule, has been overruled—not only by the same court, 19 Johns., 77—21 Wend., 132, 134—25th Wend., 107, reviewing the entire ground, but by other courts—3 Pickering, 452. 3 Martin's La. Rep., 111. 8 Smede & Marshall, 742. In this latter case, the court say: "A court of law, although the proper tribunal for the trial of titles to land, will not try such titles collaterally. The proceeding must be direct, otherwise the title cannot be questioned. Where there has been an eviction, the defence of failure of consideration may be let in, because the superiority of the outstanding title is then established by a judicial determination." Hay, &c., *v.* Taliaferro, Mississippi Reports. In South Carolina, where defences of this character have prevailed to the greatest extent, the courts have evinced a disposition to retrace their steps, and admit that some of their decisions have led to extravagant results. Thus in Van Leer *vs.* Parr, upon the question whether Van Leer had or had not a good title to the lands against the contingent remainder men, &c., "I give no opinion," says one of the judges, "and the court ought still to avoid deciding upon the possible future rights of such absentees. Let them first lay in their claims. The series of our decisions has finally established this proposition in the laws of South Carolina, that, whenever in the sale of lands, the seller makes a general warranty of title, and a subsisting paramount title at law to the same lands belongs to a third person, as for instance an older grantee of the same lands, in such cases the purchaser is not obliged to wait for eviction, &c." 2 Richardson Equity, 324.

We are of opinion that this objection may not be set up at law in this action, so as to set aside this agreement, being more appropriate to a court of equity, where, if necessary or proper, the contract may be rescinded or modified upon such terms as the peculiar circumstances of the case may demand, and where Williamson, or those holding under him may be made parties, and the merits of his claim directly investigated.

An embarrassment has existed in our minds as to the proper disposition of the case, owing to the very defective character of the pleadings. The defendant sets up an arrangement to extinguish Williamson's claim, and avers that the Asylum has no title; plaintiff replies that he is now and will be ready to make title *whenever defendant is ready to offer to pay* the purchase money, and this last

seems to have been the issue submitted to the jury. As there was no offer to pay at the trial, or at any other time, the contingency had not arrived when it would be proper to determine such a question.—It was, in our opinion, an immaterial issue, and we were, at first, inclined to reverse the case and send it back, on that account; but as the point was not noticed in argument and both parties have desired a decision upon the merits, we have concluded to consider the question as if properly presented and raised by the pleadings and decided by the jury. If there were a prospect of the defendant presenting the matter of his defence anew, in another firm, we should direct a repleader. 1 Burrows, 301. Cowper, 510. 16 Johns. 227. Evans v. Gee, 11 Peters, 85.

The case will then be affirmed with costs.

Chief Justice DOUGLAS dissenting.

WILLIAM CURRY, APPELLANT, *vs.* WILLIAM MARVIN, APPELLEE.

The second section of the act of July 25, 1845, which limits the jurisdiction of the Supreme Court to cases where the matter in controversy exceeds the amount or value of fifty dollars, is not in conflict with that provision of the Constitution of this State, which declares that the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant thereto, as may, from time to time, be prescribed by law.

The word restriction means *limitation, confinement within bounds,*" and as used in the Constitution, applies to the amount and to the time within which an appeal may be taken, or a writ of error sued out. The word regulation more properly applies to the mode and form of proceeding.

Courts of justice cannot act upon the presumption that powers conferred by the Constitution will be abused—or, because they may be, determine that they have not been given.

Where the sum in controversy is less than fifty dollars, this court has no jurisdiction.

William Curry, being an auctioneer in the County of Monroe, instituted a suit in the Circuit Court of that county, to recover from William Marvin, the defendant, the sum of eighteen dollars and

twenty-nine cents, being one per cent. on the sum of eighteen hundred and twenty-nine dollars, the amount of sales of certain lots belonging to defendant, and sold for defendant by plaintiff. The sum sought to be recovered was the amount of tax imposed by the county commissioners upon auction sales, alleged in this case to be the aforesaid sum of eighteen dollars and twenty-nine cents.

The defendant filed a demurrer to plaintiff's declaration in these words: "The said defendant in person says that the declaration is not sufficient in law, because he says that the county commisioners of said county levied said tax of one per cent. on auction sales without the authority of law."

At the spring term of the Circuit Court, sitting in and for the county of Monroe, Judge LANCASTER presiding, the demurrer to plaintiff's declaration was sustained, and plaintiff appealed to this court. The only question considered here, as appears from the opinion of the court, was whether this court has jurisdiction of the case.

Thomas S. King, for Appellant,

Contended that the 1st section of the act of the General Assembly of July, 25, 1845, pamphlet 12, conflicts with section 2, article 5 of the Constitution, and that appeals may be taken in any case brought to the Circuit Court.

The object of the Constitution in providing for appeals, is to ascertain the legal rights of parties, and to secure them. Every such right is intended to be secured to each individual, and any provision abridging the means of obtaining it must be expressed without ambiguity. The words of the Constitution in art 5, sec. 2, that the Supreme Court shall have appellate jurisdiction, "under such restrictions and regulations," cannot be construed to authorize the Legislature to debar a party of his right of appeal. The words, "restrictions and regulations," apply to the modes and forms of proceeding in taking and prosecuting appeals. The restrictions were intended to be of the same nature with those which existed at the making of the Constitution, and operated then in prosecuting appeals. It will be seen, by reference to the laws regulating appeals and writs of error at that time, that there was no limit as to the amount in controversy, except in cases of $10 and under, over which justices of the peace had final jurisdiction. The restrictions in prosecuting appeals, then, are found in Duval, p. 109 to 112. The appeal must have been

taken within ten days after the session of the court at which judgment was rendered, p. 108, sec. 1. Before it would be heard, there must have been a bond filed with securities, if plaintiff, for the costs—if defendant, for the amount of the judgment and costs; a copy of the proceedings must have been filed the first day of the term, or the case would be dismissed. Sec. 2 & 4, p. 108, 109. For a writ of error to operate as a *supersedeas*, there must have been a special order of court; and a bond filed in double the amount of the judgment or costs, and the writ must have been sued out within two years after judgment. Sec. 7 & 10, p. 109, 110. In judgments against officers of the court, the same bonds and limitations as to time are provided as in other cases. Sec. 3, p. 111, 112. By act February 12, 1836, before appeal taken, the costs accrued and to accrue must have been paid, p. 112. In criminal cases, before the appeal could operate as a *supersedeas*, there must have been bond and security given to abide the judgment or sentence, p. 112.

These provisions are restrictions upon parties—they are intended to restrain them from taking appeals as of course—or from unfounded and vexatious appeals, and to give full security upon the final decisions. They are mere "regulations"—which refer to the forms and order of proceeding in taking appeals, and are in part prescribed by the acts before referred to, and by the rules adopted by the Court of Appeals, under sec. 12, p. 110, where it is authorized to make rules for the "regulation" of cases brought to it. A restriction as to the time in which appeals must be taken, and to prosecuting them without giving bond and security, is something more than a regulation for the forms and order of proceeding in taking up and prosecuting an appeal. There is a wide distinction between these restrictions as to bonds and securities and limitations of time, and restrictions upon the right to which every individual is entitled, of appeal to a higher tribunal to obtain a legal claim, of which he is deprived by the judgment of the inferior court. Such a right can be barred only by clear and unmistakable language in the Constitution. The Constitution does not and intends not to prohibit an appeal to obtain a legal claim—its object is to provide such restrictions and regulations as will give full security and prevent injustice to parties, and of this nature are the restrictions and regulations that existed at its formation.

If the Legislature can restrict appeals to cases where the amount

claimed is over $50, it can restrict them to the highest amounts, and may exclude questions on the construction of a statute it may pass, or any question, except those of the nature it may specify, from appeal. Such a construction of the Constitution might otherwise work great wrong. A party may have a multitude of accounts, each under $50, amounting to thousands of dollars, the recovery of all which depends on the same principle of law, yet, because none of his accounts amount to $50, he may lose all for want of an appeal. Suits are often brought on small amounts, to test questions (which is the design in this case) involving principles on which large claims depend, and in the establishment of which the community is deeply interested. In none are they more interested than in settling the construction of statutes by the courts. No construction should, if possible, be given to the Constitution which might work inconvenience or injustice, or which militates against its spirit, as would certainly be the case if any one, however small his claim, were prohibited from ap-

Further: the Constitution can alone limit the jurisdiction of this court.

pealing, when he feels aggrieved by the judgment of an inferior court.

The 2d Sec. Art. 5, referred to, is the only one in the Constitution that gives jurisdiction to the Supreme Court. This is the clause from which it derives not only the power of "appellate jurisdiction only, except, &c.," but whatever power it has. This power authorizes its exercise of appellate jurisdiction, which is the only jurisdiction the court has, except the power given in the same section, to issue certain writs for maintaining its control over other courts. The clause conferring jurisdiction is connected with the words, "except in cases otherwise directed in this constitution," and is intended to convey the meaning as if read "the appellate jurisdiction shall extend to all cases, except to cases otherwise directed in this Constitution," as well as to read "the court shall have appellate jurisdiction *only*, except in cases otherwise directed in this Constitution." If, then, there be any limitation as to the amount in cases, it must be sought for in the Constitution. Such a limitation does not exist there.

Marvin, for Appellee.

Chief Justice DOUGLAS delivered the opinion of the court:

This case was brought up by appeal from the Circuit Court of Monroe County. The plaintiff in his declaration demands of the defendant

the sum of eighteen 29-100 dollars, the damage laid is ten dollars—making in the aggregate the sum of twenty-eight 29-100 dollars only. We are, therefore, met at the threshold of the case here, with the question, whether this court has jurisdiction in it?

The Constitution of this State, chap. 4, sec. 2, No. 1, of Thompson's Digest, page 50, declares that the Supreme Court, except in cases otherwise directed in this constitution, shall have appellate jurisdiction only—which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this constitution, as may, from time to time, be prescribed by law."

The act of the General Assembly of July 25th, 1845, 1 Pamphlet Laws, page 12, Thompson's Digest, sec. 2, No. 5, pages 50, 51, prescribes that "the Supreme Court of this State shall have and exercise appellate jurisdictions in all cases brought up by appeal or writ of error from the several Circuit Courts, when the matter in controversy exceeds the amount or value fifty dollars." This act limits the jurisdiction of this court, and must govern the proceedings in this case, unless it is repugnant to and conflicts with the provision of the constitution above cited.

It is contended by the counsel for the appellant that it does so conflict; at least we understand the argument to be, that a strict construction of the article of the constitution before referred to, would make it thus conflict; that the words of that article, "the Supreme Court shall have appellate jurisdiction, under such restrictions and regulations, ought not and cannot properly be construed to authorize the Legislature to debar the party of his right of appeal, however *small* the sum or value in controversy may be. Those words, it is argued, apply only to the modes and forms of proceding in taking and prosecuting appeals. To this proposition, as thus laid down, we cannot yield our assent. The word *restriction* is defined by the best lexicographers to mean *limitation, confinement within bounds*, and would seem, as used in the constitution, to apply to the amount and to the time within which an appeal might be taken, or a writ of error sued out. The word *regulation* has a different signification—it means method, and is defined by Webster in his Dictionary, folio 3d, page 929, to be "a rule or order prescribed by a superior for the management of some business, or for the government of a company or society." This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of

error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases; and that the word *restriction, as used in the* constitution, supports and fully sustains the provisions of the 2d section of the act of 25th July, 1845, which by its terms limits the jurisdiction of this court to cases where "the matter in controversy exceeds the amount or value of fifty dollars."

It is further argued that "If the Legislature can restrict appeals to cases where the amount claimed is over fifty dollars, it can restrict them to the highest amounts, and may exclude questions on the construction of statutes it may pass." But it is not to be presumed that the General Assembly would thus abuse the authority which, by the clause of the constitution above cited has been conferred upon it.—The same argument would hold as to any discretionary power. All such powers may be misused; but courts of justice cannot act upon the presumption that they will be, or because they may, determine that they have not been given. These were more properly matters for the consideration of the convention that formed the constitution and the people who adopted it. The Constitution of the United States (Art. 3, Sec. 2,) provides that "The judicial power shall extend to *all cases in law and equity* arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects." In all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party, the Supreme Court shall have *original jurisdiction.* In *all other cases*, before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make. 1st United States Statutes at large, 18. Thomson's Digest, App. 561. Under the power conferred by this Article, Congress (by the Act of 24th September, 1789, 1st U. S. Statutes at large, 80,) provided that "Final judgments and decrees in *civil* actions and suits in equity in a circuit court, brought there by original process, or removed there

by appeal from the district court, where the matter in dispute *exceeds* the sum or value of two thousand dollars, exclusive of costs, may be re-examined and reversed or affirmed in the Supreme Court.

Now it may as well be said that, if the Congress of the United States can restrict appeals and writs of error to the Supreme Court to *civil cases* where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, it may restrict them to the highest amount; or that, if it may except one class of cases, it may except all or, at least, so large a portion as to render that high tribunal almost entirely useless. We have seen that the judicial power extends to all *cases* in *law and* equity, yet the Supreme Court of the United States has no appellate jurisdiction in *criminal* cases, and cannot revise the judgments of the circuit courts by writ of error or *habeas corpus*, in any case where a party has been convicted of a public offence. *Ex parte* Kearney, 7 Wheat. 38. It could not, if the excess of the fine were apparent on the record. *Ex parte* Tobias Watkins, 7 Peters, Reps. 568, 574. The appellate jurisdiction given to the Supreme Court by the Constitution, (Art. 3, Sec. 2,) being with such exceptions and under such regulations as the Congress shall make. If Congress has provided no rule, the Court cannot exercise the appellate jurisdiction; if the rule is provided, it cannot be departed from. Wiscart *v.* Danely, 3 Dall., 321, 327. 1 Peters Cond. Rep., 144, 146. The term *civil actions would*, from its natural import, embrace every species of suits which is not of a criminal kind. 3 Dall., 321. 1 Peters' Cond. R., 146; yet the Supreme Court of the U. S. has no revising power over the decrees of the District Court sitting in bankruptcy. *Ex parte* Christy, 3 Howard, S. C. Reps., 292. But "because there is no appeal given, it by no means follows (say the court in the latter case) that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments, either of the District or Circuit Court in criminal cases, and yet, within the cognizance of one or both of those courts, are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors affecting the liberty and the property of the citizens." And yet there can be no doubt that the denianl of appellate jurisdiction is founded in a wise, protectional public policy. The same reasoning would apply to the appellate jurisdiction from the decrees and judgments of the Circuit Court, which are limited to cases above $2,000, and cases below that sum embrace a large proportion

of the business of that court." Ibidem, 317. So cases below the sum of fifty dollars, may and generally do embrace a considerable portion of the business of our Circuit Courts; but the limitation of the right of prosecuting an appeal or writ of error to cases above that sum, is, we think, neither oppressive nor dangerous. And the appellate jurisdiction of this court, conferred upon it by the Constitution, being under such restrictions and regulations, not repugnant to that Constitution, as may, from time to time, be prescribed by law; and that jurisdiction having been limited by law to cases where the matter in controversy *exceeds* in amount or value fifty dollars; and that provision not being in our opinion repugnant to the Constitution; and the sum in controversy in this suit being *less* than fifty dollars, this Court has no jurisdiction of it, and it must, therefore, be dismissed.

Per curiam.

PHILIP COMERFORD, PLAINTIFF IN ERROR, *vs.* CHRISTOPHER C. COBB, ADMINISTRATOR *de bonis non* OF JAMES W. EXUM, DEFENDANT IN ERROR.

The regular mode of bringing the cause of action before the court is by craving oyer.

The word seal written in the scrawl attached to the name of the obligor, indicates the intention of the party executing the instrument to make it a specialty, and the intention must govern.

The word seal so written in the scrawl makes the instrument a writing obligatory or specialty, to which the plea of the statute of limitations is bad.

This case came up on a writ of error from Jackson Circuit Court. An action of debt was brought in that court by Christopher C. Cobb, administrator *de bonis non* of James W. Exum, on the instrument stated and set forth in the opinion delivered by the court, against Philip Comerford, the plaintiff in error in this court.

Comerford pleaded the statute of limitations—to which plea, Cobb, the plaintiff below, demurred, and for cause of demurrer, showed that the instrument sued on was a specialty, to which the statute pleaded does not apply.

The demurrer was sustained by the court; and the only question presented by the record is, whether the court erred in giving judgment for plaintiff upon the demurrer.

Keyes, for Plaintiff in Error, contended,

The statute of 1829 declares that a scrawl affixed as a seal shall be as effectual as a seal. Thompson's Digest, 348. It is clear that a scrawl is not, under the statute, *de facto,* a seal.

It is necessary that the instrument itself to which the scrawl is affixed, should bear witness that the scrawl was affixed as a seal. 1 Mun. Rep., 487, 491. 4 Mun. Rep. 442. Minor's (Ala.) Rep., 187. 2 Randolph Rep., 446. See 2 Cowen & Hill's notes. 10 Philip's Evidence, 1227, for the American learning on the point.

Some doubt may exist whether the point be properly presented. It is submitted that the statute, which requires the cause of action or a copy thereof to be filed with the declaration, makes the cause of action, or the copy when so filed, a part of the record. And as the demurrer to the plea of the statute of limitations presents the whole record to the court, the variance which appears between the cause of action and the description thereof in the declaration, is a ground well shown for the reversal of the judgment of the court below.

The court is also referred to 4 Ark. Rep., 196, and to 6 Ark., 117, where the point is mentioned as *res adjudicata.*

Carmack, Stephens N *Baker,* for Defendant in Error:

The record in this case presents the single question: Did the court below err in sustaining the demurrer to the plea of the statute of limitations?

1. Actions of debt founded on *specialty* are expressly excepted out of the statute of limitations. Th. Dig., 442, sec. 1.

In this case, the "cause of action" is described in the plaintiff's declaration as a *specialty,* "writing obligatory sealed with the seal," of which profert is made. The defendant, by his pleadings, admits the "cause of action" to be such as it is described in the declaration.

If the defendant in the court below desired to present the question, whether the cause of action was a *specialty* or not, he should have craved *oyer* and *demurred.* 1 Chitty Pl., 466-'7.

If this view of the subject be correct, it is unnecessary to enter into a discussion of the question presented by the argument on the other side, as to the effect of a scrawl.

By referring to the case cited on the other side,, 4 Ark., 195, the court will perceive that the question was presented by the defendants craving *oyer* and then demurring.

Justice LANCASTER delivered the opinion of the court:

The plaintiff, C. C. Cobb, Administrator, &c., brought suit in the court below against P. Comerford, the defendant in that court and plaintiff in error here, in an action of debt, and declared upon a writing obligatory. At the bottom of his declaration a copy of the cause of action is set forth in these words, viz:

"Twelve months after date we or either of us promise to pay Frederick L. Ming, Executor to the Estate of James W. Exum, deceased, the sum of one hundred and forty-nine dollars and fifty cents, for value received. December 29th, 1838.

(Signed) "H. J. MARLY, [SEAL.]
"CHARLES TRIPP, [SEAL.]
"PHILIP COMERFORD, [SEAL.]"

To this declaration sundry pleas were pleaded, but all were withdrawn but the plea of the statute of limitations, viz: *non accrevit* within five years; to which plea plaintiff demurred, issued was joined on demurrer and demurrer was sustained and judgment given for

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esablished in those cases seems to be that, where the writing concludes with the words "Witness my hand," and the obligor signs his name with a scrawl at the end, it is not sufficiently shown he intended to make a seal, or he would have given stronger evidence of his intention; and instruments of the character involved in the principle were ruled, in those decisions, not to be sealed instruments. But in those decisions it is fairly inferrable, had there been sufficint from which to discover an intention on the part of the obligor to make a sealed instrument, the ruling had been different. The intention of the obligor, at the time of making the writing, if ascertainable, is to govern. Now, within the scrawl attached to the name of the obligor, Philip Comerford, the word *"seal"* is written, plainly and unequivocally indicating the purpose for which the scrawl was attached.

In the case of Dardenne vs. Bennett et al., 4 Ark. R. 456, the court, upon a review of the authorities, expressly rule that the clause *"in cujus rei testimonium"* is not essential to a deed or bond.

In the case of Birtrand vs. Boid, 4 Ark. R. 196, before cited, the decision was upon an instrument having a scrawl, with the word "seal" written in it, precisely as in this case. The statute upon which its efficacy depended is in these words: "every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed." The writing was ruled to be within the provisions of the act, and to be regarded as a sealed instrument.

The statute of Florida is in these words: "A scrawl affixed as a seal to any instrument shall be as effectual as a seal." Thompson's Digest, 348.

This, then, in effect, is a sealed instrument and was so intended by the parties at the time of its execution. It is, then, in contemplation of law, a writing obligatory or specialty—to which the plea of the statute of limitations has repeatedly been held to be had. Indeed, it is not recollected that there is any conflict of authority on this point. No error has been perceived in the judgment of the court below; it must, therefore, be affirmed with costs.

DAVID GORDON, & SUSAN HIS WIFE, FORMERLY SUSAN E. FISHER, PLAINTIFFS IN ERROR, *vs.* JOHN G. CAMP, DEFENDANT IN ERROR.

When money is the subject of bailment, or delivery to an agent, paid or unpaid, *assumpsit* is the proper remedy;—*assumpsit* in the form of money had and received usually being, in case of money, a substitute alike for trover, trespass, and case; though as a substitute for trover, there need be no previous demand.

The count for money had and received will be supported by evidence of the defendant's receipt of bank notes.

A count for money had and received may be proved by any legal evidence, showing that the defendant has possession of the money of the plaintiff, which in equity and good conscience he ought to pay over.

Assumpsit will frequently lie, where there has been non-feasance, misfeasance, or malfeasance, the plaintiff in such cases waiving the tort.

This cause was heard at the Fall Term of the Circuit Court of the Middle Circuit in the county of Leon, the Hon. THOMAS DOUGLAS presiding. The proceedings in the case in the court below are fully and clearly stated in the opinion delivered by this court:

Brockenbrough, for Plaintiffs in Error:

The declaration contains three special counts, and the money counts.

The plea is bad, because it does not state that he brings into court, or that he has the same identical Florida money, or what sort of Florida money he had, or that he made any effort to sell it, or what was the value at any time whilst he had it, or what was offered for it—but only that he could not sell it for its *fair and full value.*" That was not his contract, but to dispose of to the "best advantage, &c."—which shows that the money was to be sold for the best market price that could be obtained, and this was to be the only test of value. Its intrinsic or full value, perhaps, was unknown to either party, and seems not to have entered into their contemplation.

But it is said the action is not well brought; that it was a gratuitous bailment, and the most that could be made of it would be action *on the case* for non-feasance. The authorities do not sustain this. Sufficient consideration for the promise—which is *express*, not implied—is laid in every court, and is expressed on the face of the note. The receipt of so much Florida money, (decided in this court to be *money*,) and averred in the declaration to be of par value in

specie is surely a sufficient consideration for a promise to remit the amount in specie, or Northern funds. It is admitted in the note and the plea to have been of *some value.*

Defendant's excuse is, he could not get enough for it. If this is not consideration enough for a promise in *assumpsit,* no action for money loaned, or had and received, or account stated, can be maintained. Opposite counsel seem to misconceive the case of Coggs *vs.* Bernard, in 2d Lord Raymond, as well as Mr. Smith, in his leading cases, and his American editors.

That case establishes that a mere trust or confidence reposed in a man, without reward, who undertakes to do something for another, either to his goods or money, is sufficient consideration to render him liable on an implied promise to perform it well after he undertakes it, and actually enters upon the trust, by taking possession of the money or chattels. That he may be liable on implied promise, or for breach of trust, or gross negligence, as the case may be.

It decides nothing as to the form of the action—whether it is to be a *special action* on the case for non-feasance, or misfeasance, or an action of trespass on the *case upon promises, (assumpsit,)* depends on the circumstances of the case to be conidered, and not on the quetion of liability, which was the only question in Coggs *vs.* Bernard.

Even when there is no contract whatever in the case, the American editors state (1 Smith, 198,) that "it may be proper to note, that where *money* is the subject of bailment, or delivery to an agent, *paid or unpaid, assumpsit* is the proper remedy," and he cites 6 New Hampshire, 537, Groves, et al. *vs.* Ticknor. And that he is speaking exclusively of cases where there is *no contract.* See p. 186, paragraph beginning *"unpaid agents"* Here there is an express contract. Why not folow its own words? Why seek to find what the law would do, if we had none?

As some evidence that I have not misunderstood Mr. Smith, I refer to his later work, 46th Law Library, 59, Smith on Contracts.—The cases which he there cites, along with Coggs *vs.* Bernard, are cases in *assumpsit* and cases very similar to the present. And in one of them, a very striking case, Coggs *vs.* Bernard, is cited by counsel, and the reporter in his note, see Shillibur *vs.* Glynn, 2 Meeson & Welsby, Exchequer R., 143.

And in the other case, precisely in point to this, and in *assumpsit*—

(see 2 Bingham, 414. Eng. C. Law, 485,)—Chief Justice Best cites with approbation the case of Coggs *vs.* Bernard, as sustaining him, and never seems to have dreamed that it was the less applicable because that was case, and Whitehead *vs.* Greetham was *assumpsit.* Because the principle of liability, and reason of liability, was precisely the same—only in Cogg *vs.* Bernard, *case* had to be brought because the liability was for spilling brandy, gratuitously to be carried; and in the other, *assumpsit,* because it was for failure to secure an investment of certain money deposited with defendant for that purpose, to be gratuitously invested.

The case of Rutgers & others *vs.* Sweet, 2 Johnson's cases, 92, was *assumpsit,* upon a receipt very similar to the one here sued upon. It was sustained. The distinction seems to be, between a *gratuitous* promise to do something in future without entering upon it, or receiving in *trust* the money or goods with which it is to be accomplished, or about which, the thing promised, is to be performed. In such case, no action lies in case, or *assumpsit.*

But it is undertaken, and the *trust* reposed by the delivery of the money or chattels, (whereby the party is prevented from performing it himself, or having another agent,)—in such case, the party neglecting his duty is responsible in *assumpsit* or in case, according to the nature of his contract, or the subject-matter, or the nature of the loss.

The case of Thorne *vs.* Deas, 4 Jo., 84, was a case of a gratuitous promise of one partner to another to effect insurance on joint property—nothing was given or advanced, and no trust reposed further than mere confidence in his word. Such a promise raises no liability certainly, whether in *assumpsit* or *case;* and that action was not sustained, though brought *in case..*

But this note was good on the *money counts.* Especially the account stated, *"I agree to pay,"* imports a consideration. Davis *vs.* Wilkinson, 10 Adolphus & Ellis, 98. 37 Eng. C. Law, 61.

Douglas & Hogue, for Defendant in Error:

1. The action of *assumpsit* is not the proper form of action in this case. It should have been *case.* An unpaid agent undertaking to perform anything, is liable to this form of action only, for damages resulting from the manner of his performance. 1st Smith's Leading Cases, 186, 169. Coggs *vs.* Bernard, 5 Durn. & East, 143.

2. The defendant in this case was a mere bailee, without reward, and must have been guilty of gross negligence in order to render him liable as a mandatory; and this gross negligence would be the ground of action on the *case*. Id. & 1 Esq., 74.

3. Unpaid agents are only liable for such injuries to property, as they would be liable for if the property remained in the possession of plaintiff. 1 Smith's Leading Cases, 187.

4. The action of *assumpsit* can only be maintained, where there is such a conversion as that *trover* will lie, or where money has been received on deposit; and this because it is a *quasi* recovery of the thing. Smith's Leading Cases, 188.

HAWKINS, Justice, delivered the opinion of the court:

This was an action of *assumpsit* brought by Gordon and wife against Camp, the appellee, on the following instrument of writing:—

"TALLAHASSEE, FLORIDA, FEBRUARY 5TH, 1842.

"Received from Mrs. Susan E. Fisher three hundred and eighteen dollars in Florida money, which I am to dispose of to the best advantage for specie of northern current funds, and remit the avails to her at Warrington, Virginia, which I expect to do on or before the 1st August next, from Washington city, as I pass through that place for my former residence in Ohio. JOHN G. CAMP."

The declaration contains three counts upon the above agreement as a promissory note, and the usual money counts, among which is one for *money had and received* and one upon an *account stated*. To this declaration *non assumpsit* was pleaded and the following special plea, to wit:—

"And the said John G. Camp, by Douglas & Hogue, his attorneys, comes and defends the wrong and injury when, &c., and says that the said David Gordon and Susan E., his wife, ought not to have or maintain their aforesaid action thereof against him, because he says that at the time and at all times since the aforesaid sum of three hundred and eighteen dollars was placed in his hands for sale, it could not be sold for its fair and full value. And the said John G. Camp further saith that he, the said Camp, hath always, from the fifth day of February, 1842, the time when the said sum of three hundred and eighteen dollars Florida money, was placed in his hands for sale by said plaintiffs, hitherto and at all times been ready to pay over and return to the said plaintiffs the aforesaid sum of three hun-

ing that the defendant has possession of the money of the plaintiff which, in equity and good conscience, he ought to pay over. "It is a liberal action, in which the plaintiff waives all torts, trespass and damages, and claims only the money which the defendant has actually received." 2 Greenleaf's Evidence, 105.

In reply to this it may be urged that money was not, in this case, the subject of the bailment, yet Camp acknowledges the receipt of so much *Florida money.* What is the precise legal definition of this term, it is unnecessary now for the court to declare, though in the case of Williams *vs.* Moseley, it is clearly indicated its opinion as to another term substantially resembling it. It is sufficient as to the decision of the case at bar, that the court understands, that that which Camp received *was to be treated as money,* and the best evidence of it is Camp's own declaration. In such a case, that an action *for money had and received* is sustainable, seems to admit of no doubt.

Professor Greenleaf, in speaking of such an action, remarks: "In regard to things *treated as money,* it has been held that this count may be supported by evidence of the defendant's receipt of *bank notes,* or promissory notes, or credit in account in the books of a third person, or a mortgage assigned to the defendant as collateral security, and afterwards foreclosed and brought in by him, or a note payable in specific articles, or a chattel." 2 Greenleaf's Ev., 106. It is presumed in this case, that Camp received *bank notes,* though that fact does not appear upon the record.

In the case of Pickens *vs.* Bank, 13 East., 20, the facts were these—a stakeholder, receiving *country bank notes* as money, paid them over wrongfully to the original stakeholder, after he had lost the wager. An action *for money had and received* was brought to recover the money thus paid over, and it was contended the action would not lie, because *bank notes* were paid, and they were not money. Lord Ellenborough said: "Provincial notes are certainly not money; but if the defendant received them as ten guineas in money, and all parties agreed to receive them as such at the time, he shall not now turn round and say, that they were only paper and not money. As against him, it is so much money received by him."—See also page 130, same work. So in Mason *vs.* Waite, 17 Mass. R., 560. *A.* delivered *bank notes* to a carrier, who paid them to B., for a loss at a faro table—it was urged that, inasmuch as the bail-

ment consisted of *bank notes, assumpsit* would not lie, but the court ruled otherwise, C. J. Parker observing: "We cannot see, however, why the action for *money had and received* will not lie. The notes were paid and received as money; and as to any want of privity, or an *implied promise,* the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the *law implies a promise* that he will pay it over." So in Ainslee *vs.* Wilson, 7 Cowen Rep., 662, it was held, that *property* paid or received *as money* will support the action for money paid, or *had and received,* the same as if money itself had been paid or received. And if money has been misapplied, the law will raise an *assumpsit,* where it has been received for the use of another. Dumond *vs.* Carpenter, 3 Johns. R., 183. Again: "if a party gives another that which may readily be turned in money, it may be treated *as such* in an action for money had and received. Doug. 137. 4 Bing., 178; and where the property delivered to defendants is saleable, the receipt of money may be presumed, particularly *after a lapse of time.* Ib., 4, T. R., 687. 3 B. & P., 559. 2 Saunders' Pl. & Ev., 672." We refer also to the authorities cited by counsel of appellants, viz: Whitehead *vs.* Greetham, 2 Bingham, 464. Shilliber, *vs.* Glynn, et al., 2 Mee. & Welsby. Ex. Rep., 143. 10 Ad. & El., 98. The American annotator upon the case of Coggs *vs.* Bernard, (1 Smith's Leading Cases, 188,) speaking upon the subject of bailment, after giving his views as to *unpaid agents,* holds this language: "It may be proper to note, that where money is the subject of bailment, or delivery to any agent, paid or unpaid, *assumpsit* is the proper remedy; *assumpsit* in the form of *money had and received* usually being, in case of money, a substitute alike for trover, trespass, and case; though as a substitute for trover, there need be no previous demand. See Graves et al. *vs.* Ticknor, 6 New Hampshire, 537. We have looked at that decision—it is lucid and able, and fully sustains the foregoing remarks.

The defendant in the suit pleads a tender, with a *profert in curia* of three hundred and eighteen dollars of Florida money. The tender admits the existence and validity of the debt or duty, insisting only upon the fact, that there has been an offer to pay or perform it. It admits the contract and facts stated in the declaration, and goes only in bar. 2 Greenleaf on Ev., 562. 2 Saun. on Pl. & Ev., 836-'7. The plea does not state that the tender was made *before the*

commencement of the suit, and is, therefore, insufficient. Ordinarily, the tender should be made at the time the money became due; but if no day of payment is fixed upon, proof of tender before suit brought would be sufficient. 2 Greenleaf, 567. 2 Saunders' Ev., 237. The plea, too, in other respects, is exceptionable, if the tender was intended as one of specific articles, for it does not state that the Florida money tendered is the same that was received; nor does it set forth that Camp endeavored to dispose of it to the best advantage, but merely that it could not be sold for its full and fair value.

In conclusion, we are not to be understood as deciding, that the plaintiff is absolutely entitled to recover the full amount which the recepit of Camp calls for upon its face. The action, as we have seen, is an equitable one, and the plaintiffs are entitled to recover such damages as they are entitled to *ex equo et bono*, they being dependent upon the value of the bailment entrusted to his charge.

We think, for the reasons herein set forth, the demurrer to the defendant's plea should not have been overruled by the court below, and that the judgment of the court was erroneous. It is, therefore, ordered that the judgment of the court below be reversed, and that the cause be remanded thither, for further proceedings in accordance with this opinion.

WILLIAM D. MOSELEY, TENANT, &C., APPELLANT. *vs.* JOHN DOE, EX DEM. HENRY R. EDWARDS, APPELLEE.

The lien of a judgment is not lost by mere delay to sue out execution.

An execution sued out after a year and a day is not void, but voidable only.

The right of the plaintiff to sue out execution after such time can be questioned only by the defendant; it cannot be impeached collaterally.

The lien of a judgment growing out of a matter of record, is constructive notice to all the world.

Real property levied on under a junior judgment and sold, is still subject to the lien of an older judgment; and the Circumstance of not proceeding upon the older, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien.

Appeal from Circuit Court of Jefferson county.

The jury found a special verdict, which is recited at length in the opinion pronounced by the court, and which sets forth the facts of the case. Upon this finding, the court below, Judge BALTZELL presiding, held the law to be for the plaintiff, and gave judgment accordingly—from which judgment, defendant appealed.

S. W. Carmack & James T. Archer, Esquires, for Appellant.

L. A. Thompson, Esquire, for Appellee.

Opinion by Chief Justice DOUGLAS:

This is an action of ejectment, instituted in the circuit Court of Jefferson county, on the demise of Henry R. Edwards, the appellee, against Richard Roe, Wm. S. Hill tenant in possession, to recover the premises in the declaration mentioned. Wm. D. Moseley, the appellant, who, on motion, admitted the defendant, in the place of the said Roe and Hill, and thereupon he (the said Moseley) confessed the lease, entry and ouster in the declaration mentioned, and put in the usual plea of not guilty—upon which issue was joined, and the cause was submitted to a jury upon the evidence, who returned a special verdict, which, amongst other things, set forth: That, on the 4th day of November, A. D. 1839, and before that time, one John D. Edwards, of the county of Jefferson, was seized in his demesne as of fee, of and in the messuages, lands and tenements, with the appurtenances, in the declaration mentioned; that, on the said 4th day of November, A. D. 1839, one William Wilson, by the consideration of the Superior Court of the Middle District of Florida, in and for the county of Jefferson, recovered judgment against said John D. Edwards, for the sum of fourteen hundred and forty-nine dollars and thirty cents for his damages, and the sum of four dollars and forty-eight cents costs—on which judgment a writ of execution was issued in due form of law, on the 8th day of June, 1842—the said judgment not having been revived by *scire facias,* against the said defendant; that, on the 2d day of November, 1840, one William G. Ponder, by the consideration of the same court, recovered judgment against the said John D. Edwards, for the sum of three thousand two hundred and one dollars and eighteen cents for his damages, and the sum of $4 52-100 for his costs—on which judgment a writ of *fi. fa.* issued in due form of law; that, on the 23d day of April, 1841, one Harriet T. Wilson, administratrix of Robert H. Wilson, by the con-

sideration of the same court, recovered judgment against the said John D. Edwards, for the sum of thirteen thousand six hundred and thirty-nine dollars, sixty-two cents, for her damages, and the sum of ———— for costs—on which judgment a writ of *fieri facias* issued in due form of law; that, on the 5th day of November, A. D. 1844, Christopher Hagan and Harriet Hagan, by the consideration of the same court, recovered judgment against the said John D. Edwards, for the sum of fifteen thousand three hundred and forty-three dollars and fifty-seven cents for their damages, and $6 12-100 for their costs—on which judgment a writ of *fieri facias* issued in due form of law; that, on the last specified judgment, an alias writ of *fieri facias* issued in due form of law on the 21st day of October, 1846, which was levied on divers property of the said John D. Edwards, including the premises in question; and that, by virtue of said *fieri facias,* the interest of the said John D. Edwards in the lands levied on was sold by the sheriff, on the first Monday (the 7th day) in December, 1846, by consent of parties; and that at said sale, William D. Moseley, the defendant, purchased all the interest of the said John D. Edwards, in and to the lands and tenaments, &c., including therein the premises in dispute, at and for the price of ten dollars, and received a conveyance therefor in due form of law, executed from Smith Simpkins, Sheriff of Jefferson county; that, William G. Ponder having, on the 11th day of November, 1846, sued out a *pluries* writ of *fieri facias* on his judgment, did claim and receive the said sum of ten dollars, the price of said land; that one William Denham having obtained an assignment of the judgment, heretofore specified, of William Wilson, caused an alias writ of *fieri facias* to be issued thereon, on the sixteenth day of February, A. D. 1847, in due form of law, and placed the same in the hands of the said sheriff of Jefferson county—by virtue of which last mentioned writ of *fieri facias*, the said sheriff levied upon the following described property, viz: the west ½ of the southwest ¼, Sec. 27, T. 1, R. 3 N. & E.—east ½ of the southeast ¼ of Sec. 29, T. 1, R. 2, N & E.—the northeast ¼ of the northeast ¼ of Sec. 32, T. 1, R. 3, N. & E.—northwest ¼ of the northwest ¼ of Sec. 30, T. 1, R. 3, N. & E.—southeast ¼ of the southwest ¼ of Sec. 28, T. 1, R. 3, N. & E. October 16th, 1847.

The above lands were advertised according to law, and sold on the 6th day of December, being the first Monday of said month, Henry

R. Edwards bidding twenty-four dollars; being the highest bidder, they were knocked off to him. That the said Henry R. Edwards, the plaintiffs lessor, being such highest and best bidder at said sale, and being declared the purchaser of said lands, which are the premises in the declaration mentioned, the said premises were in due form of law conveyed to him by deed, duly executed by James R. Tucker, Esquire, Sheriff of said county. And we the jury further find, that, on the 10th day of March, A. D. 1848, the said defendant, William D. Moseley, was in possession of the said premises by his tenant, William S. Hill.

And the jury having submitted to the court the question, whether the said plaintiff or the said defendant was in law entitled to judgment upon the facts presented in said special verdict, the court pronounced judgment for the plaintiff, and the defendant appeals to this court. The facts were all fully stated in the special verdict, but as there is no controversy about them, it is deemed unnecessary to recite them more fully.

The only errors assigned are, that the court erred in rendering judgment for the plaintiff, and in not rendering judgment for the defendant. And the only question presented for our consideration is, whether the sale of the lands in question, by virtue of the *fieri facias* issued upon the junior judgment of the Hagan's, carries the title against the elder judgment rendered in favor of William Wilson.

The question arises under our act of the Legislature, entitled "An act in relation to liens created by judgments," approved February 12, 1834. Duval's Com., 369. Thompson's Digest, 351, 352; the first section of which declares that every judgment at law and decree in equity, which shall be entered and pronounced in any of the courts of this State, shall create a lien, and be binding upon the real estate of the defendant or defendants, *as at common law.*

The second section declares, "That no judgment at law or decree in equity shall create a lien upon the real estate of the defendant situated in any other county than the one in which the same shall have been rendered or pronounced, until the said judgment or decree shall have been recorded in the county in which the real estate, so sought to be bound, may be situated.

The counsel for the appellant contend, that as a judgment created no lien upon the lands of the defendant at common law, the words *as at common law*, at the close of the first section of our statute above

cited, must refer to the lien given by the statute of West. 2, 13 Edward 1st; and by that statute they insist that the liens dependend upon the right of the plaintiff to sue out an *elegit,* citing 1 Call Reps., 125. 4 Hen. & Mumford, 51, and 2 Brock. Rep., 254; and so, under our statute, the lien, they argue, depends upon the right of the plaintiff to sue out a *fieri facias;* that, after the lapse of "a year and a day," the right of the plaintiff to sue out a *fieri facias* was suspended, until the judgment should have been revived by *fieri facias,* and the lien was also suspended. Consequently a *fieri facias* issued upon a junior judgment, and levy upon and sale of the land defeated the lien of the elder judgment, and vested the title in the purchaser. This construction, however, we consider too far fetched. From the peculiar phraseology adopted, it is to be sure somewhat difficult to give those words any meaning. The common law was in force by virtue of the act of Nov. 6th, 1829, "For the adoption of the common and statute laws of England," &c. (Duval's Comp., 357, sec. 1. Thompson's Digest, p 21, No. 2,) when the above cited act was passed. If, therefore, the common law had made judgments a lien upon the lands of the debtor, to have passed an act declaring that judgments should create a lien upon the real estate of the defendant, "as at common law," would have been not only useless but absurd. It is our duty to give those words a sensible construction, if possible; if we cannot, we must reject them altogether. We do not feel authorized to say, that a statute giving a lien "as at common law," means a lien according to a British statute. By the common law, lands and tenements were not subject to be taken in execution at the suit of a common person, except in case of an heir, who had been sued upon a bond of his ancestor, in which he was expressly named. To remedy this obvious defect, came the statute of West. 2, 13 Edward 1st, Ch. 18, which did not in express terms give a lien upon the lands of the debtor, but provided "That when debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be from thenceforth in the election of him, (the plaintiff,) to have a writ that the sheriff *fieri faciat* of the lands and goods of the debtor, &c., and the one-half of his land, until the debt be levied upon a reasonable price in extent." Peck's Reps., 30. Upon this is founded the writ of *elegit,* by which all the goods of the debtor are delivered at their approved value into the hands of the creditor, and the one-half of his lands are extended. There is nothing in this statute which

indicates the time from which the land shall be bound; but by the construction of the courts, immediately after its enactment and ever since, the judgment has been held to bind the land, and the plaintiff might have execution of the lands which the defendant had at the time of the judgment, although he had aliened them *bona fide* before execution awarded. When the writ was issued and levied, it had relation back to the date of the judgment and cut out all intermediate incumbrances, and remained a lien until the debt was discharged.—Now, when this lien attached, it was subject to all the incidents of any other lien of a similar character—a mortgage for instance—and "the principle is believed to be universal," (said Ch. J. Marshall, in Rankin & Schatzell *vs.* Scott, 12 Wheat., 177,) "that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be instrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant." This is not the provision of a statute, but results from the principles of general justice and equity, and is, therefore, one of the incidents of a lien at common law. The position assumed by the counsel for the appellant is, that, as the judgment of Wm. Wilson was rendered in 1839, and had not been revived by *scire facias,* he had lost his right to sue out execution upon it, and consequently his lien was gone, *sub modo,* at least. Our statute, by the natural import of its terms, leaving out the words, "as at common law," makes a judgment at law or decree in equity a lien upon the lands of the debtor, which binds them from its rendition. May it not be that the Legislature anticipated that, even upon this phraseology, the very objection here made might be taken, and, therefore, *"ex abundanti cantela,"* added the wards, "as at common law," in order to ensure for their statute lien the same incidents as the common law gives to other positive liens, from the date of the judgment or decree. We know not what other or better construction we can give them. The learned author of the Digest has left them out as "useless verbiage," or "superfluous matter," (see note at page 352,) and surely they can well be spared. If, however, that be the proper view of the matter, then those words would seem to favor the proposition, that the lien of a judgment is not lost by mere delay to sue out execution. But the position that it is thus lost, we think is not sustained by the authorities. The augument is, that the lien under the statute of West. 2. 13th Edward 1,

Chap. 18, depends upon the right to sue out an *elegit*—ergo the lien under our statute depends upon the right to sue out a *fieri facias*, and that the holder of the judgment rendered in favor of Wm. Wilson, as above stated, lost his right, by the delay that had occurred in regard to it; but *"non sequitur,"* he had so lost his right that he could not at any time sue out a *fieri facias*. No one but the defendant in execution could question that right; it cannot be impeached in this collateral manner; it is not void, and it is voidable only at the instance of the party against whom it was issued. Oxley *vs.* Mizle 2 Murphy, 250. 3 Bacon Abr., New Ed., Title Execution, page 723, letter H, note. McCrea *vs.* Bartlett, 8 John., 361. Jackson ex dem. Roosevelt *vs.* Roosevelt, 13 John., 97, 102. Ridgeley's Executors *vs.* Gartrell, 3 Harr. & Mc Hen., 449, 450. Simmons *vs.* Wood, 6 Yerger, 521. Overton *vs.* Perkins and others, Mart. & Yerger, 367. Day *vs.* Sharp, 4 Wheat., 339. 1 Supp. to U. States Dig., 744, No. 172.

In Virginia, there is no statue which in express terms makes a judgment a lien upon the lands of the debtor; as in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. Different opinions (said Ch. J. Marshall, in the case of the United States *vs.* Morrison et al., 4 Peters' Reps., 136,) seem at different times to have been entertained as to the effect of any suspension of that right. Tucker, Pres., in the case of Watts et al., *vs.* Kearney and wife, 3 Leigh, 293, said, that, however long the judgment may have been out of date, there is no doubt that if it is susceptible of being revived at all, the lien upon the lands yet in the hands of the debtor would be revived *eodem staut.*

The case of Ridge *vs.* Prather, 1 Blackford's (Indiana) Reps., 401 to 405, is this: Prather obtained judgment against Gilwick in 1816, and had execution and *fieri facias* thereon; the sheriff returned the execution *executed* by a replevin bond the same year.—Gilwick afterwards died. Upon *scire facias* issued in 1823, against the heirs and terretenants of Gilwick & Silly, the replevin surety, the sheriff *inter alios*, returned Ridge terretenant of land that was Gilwick's at the time of the judgment. Ridge came in, and pleaded that he was a *bona fide* purchaser for Gilwick without notice, after the expiration of a year and a day from the time of the judgment on the replevin bond, and before the issuing of the *scire facias*.

Upon demurrer to this plea, there was judgment for Prather, the plaintiff, in the Circuit Court, and this judgment was affirmed by the Supreme Court, after a full discussion and a thorough examination of the principles upon which it is founded. The statute of Indiana makes judgments a binding lien upon the lands of the debtor, and is derived from Pennsylvania, (ibid., 402,) whose statute on this subject is similiar to our own. Carkhuff *vs.* Anderson, 3 Binney's Reps., p. 4, was as follows: "In 1799, Hollenbach obtained judgment against Craig; in 1801, Craig sold and conveyed his land to Anderson; in 1802 Hollenbach revived his judgment by *scire facias,* and Clarkhuff purchased the premises at sheriff's sale. In ejectment against Anderson, it was held that Hollenbach's judgment was a lien on the land, and Clarkhuff recovered." In Green & others *vs.* Allen, Wash. C. C. Reps., 280, the court held, "That the lien of a judgment which bound real estate was not lost, if, after *testaum fieri facias* had been levied and returned, the plaintiff in the writ ordered further proceedings to be stayed." In Campbell, use, &c., *vs.* Spencer et al., 4 Ala., 552, cited by the counsel for the appellant, the court, after stating the case, say: "From this statement, it appears a *levy and sale was made under these execution sufficient for their satisfaction.* and in a contest with junior judgment creditors who have acquired a lien on other property, it must be regarded as a satisfaction. To hold otherwise, would be to permit the sheriff virtually to destroy the lien created by the law in favor of the judgment of the plaintiff in error, and to prefer those judgments younger than his, which were capriciously discharged by him out of the money belonging to Marks and the Branch Bank at Mobile. It was their duty to attend to the application of the money obtained by the sale under their executions, and by neglecting to do so, they will be remitted to their claim against the sheriff, and will not be permitted to interfere with the lien of a junior judgment creditor subsequently obtained." It appears, therefore, that this was a contest between rival executions for the proceeds of the sale, and in such a contest, the court said, (page 553,) "if the lien is not lost in some of the modes here pointed out. the date of the respective judgments will determine the priority of right." It is true that, in this case, the court said that a *bona fide* purchaser under a *fieri facias* upon a junior judgment, would be protected, citing Den. *vs.* Hill, 1 Haywood, 72, where the court says: "Were it not so, dormant judgments might be revived a long time af-

terwards, and the innocent vendee evicted, without the possibility of ever regarding the purchase money," and that, in such a case, the lien of the elder judgments would be lost by the laches of the plaintiff.—But as to this it may be remarked, that this was not the question before the Alabama Court; the lien there had been lost by a levy and sale of sufficient property to pay the judgment, and neglect of the parties to see to the application of the money; and, besides, neither of those States have a statute like ours. Their statutes only subject lands to the payment of judgments, and places them as regards this question upon no better ground than an *elegit*. Indeed, in the case of Den. *vs.* Hill, 1 Hay, 81, it is said, "ever since the year 1732, the writ of *fieri facias* has issued in North Carolina against lands and tenements, as well as goods and chattels; the act of George II. declaring that they should be subject to the same proceedings and process and be held in the same manner as personal estate." This writ stands upon the same footing that it did before the 29th, Charles II.; therefore, the property of the debtor is bound from the test of the writ, citing 2 Bac. 352. Salk. 322, and 8 Coke, 71. The case of Scribe vs. Deane et al., 1 Brock., 166, was decided in Virginia, where the lien is created by the statute authorizing an *elegit*. Bliss *vs.* Bull, in 9 John. Rep., 132, relates to personal property only, and the court say: "There being no evidence of an actual levy by the sheriff on the goods and chattels of A., the sale to B. was valid, and not barred by the exception." We do not perceive its bearing upon the case under consideration. In the case of Porter's lessee *vs.* Cocke, Peck's R., 30, the lien of the elder judgment was postponed, because an injunction had been obtained, and after its dissolution, the plaintiff agreed with the defendant, in consideration of a partial payment of the judgment, to stay the execution six months. In the meantime, in execution on a junior judgment came to the hands of the sheriff, under which he sold, and the sale was held to be valid. This case is also clearly distinguishable from the one before us.

These are all the cases cited in the brief of the appellant's counsel, and they do not seem to us to sustain the proposition assumed. In Forsyth *vs.* Marbury, decided by Judge Law, and reported by R. M. Charlton, 325, 326, it is said that "the act of 1799 bound all the property of the defendant, from the signing of the first judgment."—"It is not apprehended," said that very able and learned judge, "that the statute of Geo. II., chap. 7, touches the question of lien;

it only enabled the land to be sold *absolutely* as personal property, but the execution had relation back so as to bind from the judgment. It is not an absolute right in the property itself which the creditor obtains by his judgment, either in England or in Georgia; the legal title is not transferred from the debtor to the creditor. He has, however, a *special interest,* which, although indefinite in extent, may be rendered definite by a levy; an equitable interest which is perfected by the sale, the sheriff's deed completing the transfer of the property itself, and conveying the legal title. The Master of the Rolls in Brace *vs.* Dutchess of Marlborough, 2 P. Williams 49, says, "a judgment creditor has no right in the land—he has neither a *jus in re.* nor *ad rem;* all that he has is a lien upon the land." The Supreme Court of the United States in Conrad *vs.* Atlantic Insurance Co., 1 Peters' Reps., 443, say: "it is not understood that a general lien by a judgment constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, so as to cut out intermediate incumbrances. Thus, while the creditor acquires no absolute property in the estate of his debtor, he has an interest which is capable of being defined, and which cannot be defeated save by some act of the party himself, by which it shall be lost or displaced. By pursuing the means pointed out to him by law, he is capable of converting his general lien into a specific title, which relating back to the date of his judgment, must prevail over all subsequently acquired adverse interests and rights: and thus this lien affords complete security against subsequent purchasers and incumbrances. Before this is done, the debtor having the legal title, it is true may sell and incumber the property; but whoever takes it must hold it subject to the lien, which lien growing out of matter of record, is constructive notice to all the world. A purchaser can acquire no other rights than those which were vested in the seller, in whose shoes he stands.—So, if the property be levied on by a junior judgment, it is still subject to the lien of the elder judgment. In the language of Chief Justice Marshall, the circumstance of not proceeding upon the elder judgment, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien. Rankin et al., *vs.* Scott, 12 Wheat., 179. 6 Peters' Cond. Reps., 506. Take (said the Chief

Justice) the common case of mortgages—it has never been supposed that a subsequent mortgagee could, by obtaining and executing a decree for the sale of the mortgage property, obtain precedence over a prior mortgage, in which all the requisites of the law had been observed. If such a decree should be made, without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of the purchaser. The implied lien created by the first judgment retains the preference over a lien created by a second judgment, so long as an *elegit* can issue on the first. A *statutory lien* is as binding as a mortgage, and has the same capacity to hold the land, so long as the statute preserves its force. The cases cited of execution against personal property, we do not thing apply. In those cases, the lien is not created by the judgment, or by matter of record.

In Andrews *v.* Doe ex Dem. Wilkes, 6 Howard's Mississippi Rep., 554 to 568, Chief Justice Sharkey, delivering the opinion of the Court, said: "The question is whether a prior sale, under a junior judgment, destroys the lien of the elder judgment. It is freely conceded by counsel (says the Chief Justice) that, as a general rule, it does not; but that this case forms an exception, inasmuch as the liens accrued under different jurisdiction—[one of the judgments having been obtained in a court of that State and the other in the District Court of the United States.] But as the question is fairly before the court for the first time, it is proper that it should be judicially settled," and, after citing the act of the Legislature of Mississippi of 1824, which declares "That in all cases the property of the defendant shall be bound and liable to any judgment that may be entered up,, from the time of entering such judgment, proceeds as follows: "This is emphatically a lien on all property in favor of a plaintiff. A lien is a right given by law to have a debt satisfied out of a particular thing. It may originate by contract or by operation of law and, in either case, the effect is the same—the property being bound and liable to satisfy the judgment, is as much a lien as though it had been created by act of the parties. The judgment is not only a lien, but it is a lien of record, which is notice to every one. The instance of a mortgage lien is a familiar one. There can be no difference in principle between a mortgage and a statutory lien. The one is as binding as the other." And in Ridge *v.* Prather, above cited, it was expressly held that the lien is not limited to a year and a day. Love

vs. Harper et al., 4 Humphrey, 116, is to the same effect. In Overton *v.* Perkins, Mar. & Yerg. Rep., 367, it was held that "An execution issued and levied on land more than a year after the rendition of the judgment is voidable, but not void;" and in Simmons & Whyte *v.* Wood's lessee, 6 Yerg. Reps., 518 to 522, Carton, Chief Justice, delivered the opinion of the court. "The first objection," he said, "is that an execution issued more than a year and a day after the judgment was rendered, is void, and a Sheriffs' sale by virtue thereof communicates no title to the purchaser. This position cannot be sustained by the rules of the common law. Whyte's judgment was rendered after the sale to Wood and cannot challenge it, because the sale was made after a year and a day"—citing Overton *v.* Perkins and also 8 John. Rep., 362, and 13 John., 557 and authorities there cited, which, he says, show the true rule. The case cited from 8 John. is Jackson ex dem. McCrea *v.* Bartlett, in which it was expressly ruled that, in an action of ejectment against a purchaser of land under a sheriff's sale, the regularity of the execution cannot be questioned—page 365, citing Levintz, 403. 3 Caines Cases, 37 and Shirley *v.* Wright. 1 Salk., 273. That from 13 Johns., 97, 102, is Jackson ex dem. Roosevelt *v.* Delaney and Russell, in which it was held "That the objection that the sale took place long after the return day, and that the execution had not been issued until after a year and a day after judgment, cannot affect the sale." In Butler *v.* Haynes, 3 New Hamp. 22, it was held by Richardson, Chief Justice, that "where an execution issues after the death of him against whom it runs, it is not a nullity, nor can its validity be called in question collaterally."

In Shotwell *v.* Murray, 1 John. Chancery Reps., 512, the judgments under which the lands were sold, were both in favor of the same person. The plaintiff had the first sale made under his younger judgment, and then had the same lands levied on, in the hands of the purchaser, and resold under the elder judgment. The chancellor decided that the purchaser under the younger judgment held the land, subject to a re-sale under the elder judgment.

Since the statute of West 2, 13 Edward I., it has been considered that when a man has judgments for debt, or is conusee of a statute, and the debtor before execution aliens by fine, and five years pass, yet the plaintiff may still have execution. 3 Bacon's Abr., new edition, title Execution, page 725. These authorities, we think,

clearly show that the judgment of the court below upon the special verdict was right.

It has been urged that this case comes within the spirit, if not the letter, of the statute of frauds; that the failure of the plaintiff in the elder judgment to sue out execution tended to hinder and delay creditors, and was therefore, as to them, a fraud in law. But we do not perceive the force of the argument. Junior judgment creditors were not prevented by it from proceeding; they might, at any time, pursue their remedies against the property of a debtor. It would have been sold, to be sure, subject to the lien of the elder judgment—so much as it was worth more, it is to be presumed, could have been realized from it. The plaintiff in the elder judgment had a right, in any event, to be paid out of it, unless he voluntarily relinquished his claim or it was displaced by some act of his or "the party holding it," and the judgment, being a *debt of record,* was notice of that right to all the world. Upon what reasonable ground could junior incumbrances be permitted to disturb it? Upon what principle could such a lien be divested in favor of one who knew of its existence? He can have no superior right to urge—not even an equity to set up against it. He purchases with knowledge of the prior lien, and it is supposed that he gives what an encumbered property is worth; and, in this case especially, there is surely nothing to induce a belief that the purchase was not thus made, as we are shewn by the record that ten dollars was the whole amount paid as the purchase money for several tracts of land.

The judgment of the Court below, is therefore affirmed.

Per curiam.

R. B. & D. W. POST AND DAVID C. WILSON, APPELLANTS, *vs.* WILLIAM S. CARPENTER, ET AL.

This Court having appellate jurisdiction only, to be exercised in cases brought up by appeal or writ of error from the several circuit courts, the decision of a judge sitting in vacation, is not such a decision as an appeal lies from.

The Appellants, Post and Wilson, sued out writs of attachment against property belonging to William S. Carpenter, an absconding

debtor. Other creditors also commenced suit by attachment against the said Carpenter, but the writs sued out by Appellants were first levied. The attachments of Appellants and the other creditors were levied on sundry bales of cotton at St. Marks, in the county of Wakulla, which cotton was, by order of the Judge of the Middle Circuit, sold, and the proceeds paid into the registry of the Court, to abide the final judgment to be rendered in said suits.

At the Fall term of the Circuit Court held in and for the county of Wakulla, 1848, judgments were entered up in favor of the several plaintiffs in attachment, and the proceeds of the sales of Cotton not being sufficient to pay off and discharge the debts due to all the attaching creditors, the counsel for Appellants moved the court to grant an order directing the proper officer to appropriate the said proceeds to the payment of the debts for which attachments had been first levied; or to direct payment according to priority of levy.

This motion was adjourned to be heard at a subsequent day, in Leon county, by agreement of counsel: and afterwards the motion, having been heard and argued before the Hon. Thomas Baltzell, Judge of the Middle Circuit, was overruled. From which decision the said Post and Wilson, claiming to be entitled to the moneys by reason of priority in the levy of their attachments, appealed.

The counsel for the respective parties interested agreed upon a statement of facts for the purpose of procuring a decision upon the question involved in the motion.

But the only question entertained or considered by this Court was that of jurisdiction.

J. E. Maxwell and *Douglas & Hogue* for Appellants.

Chief Justice DOUGLAS delivered the opinion of the Court:

In this case, as appears by a statement of facts presented in this Court, a motion was made at the Fall Term of the Circuit Court holden in and for Wakulla county, in the year 1848, for the distribution of certain moneys, the proceeds of property of the one William S. Carpenter, which had been sold by order of the Judge of said court, after it had been levied upon by the sheriff of said county by virtue of sundry writs of attachment, at the suit of different parties, against said William S. Carpenter; in which suits judgments had been respectively rendered in favor of the plaintiff therein; which

motion, by consent of parties, was adjourned to be heard in Leon County.

The case comes before us on the following statement, which is appended to the statement of facts above mentioned, viz:

"And the motion aforesaid, having been argued before the Judge aforesaid and considered by him, was refused and overruled, and all the parties decided to be entitled to share the said moneys pro rata. From which an appeal is taken by the said R. B. & D. W. Post and David C. Wilson."

To which statement is annexed an agreement in the following words:—

"It is agreed by and between the undersigned attorneys in the said suits of attachment that this motion be sumitted to the Supreme Court, upon the foregoing statement of facts, and that he decision of said court thereupon shall be as binding as if brought up upon a more formal record. January 15, 1849." Which agreement is signed by the attorneys of the respective plaintiffs in attachment, but is not signed by William S. Carpenter, the defendant in the said several suits of attachment, or by his attorney.

Under these circumstances we are asked to take jurisdiction of and adjudicate this case. But, after the most mature deliberation, we think that we are not warranted in so doing. That an attorney, in an action at law, has a general power to refer his client's cause to arbitration and, by entering into a reference, to bind his client, we entertain no doubt. This principle is sustained by numerous authorities. See Watson on Arbitration and Awards, pages 49 and 50. 8 Law Lib., and cases there cited. But we are not prepared to admit that they, or even the parties themselves, can by such an agreement make this court the arbitrator; and it is very evident that, if we hear this cause, we hear it in that character. The Judgment, if any was really entered in this case, appears from the statement itself to have been given in vacation, and there is nothing in that statement to show that there was any agreement that it might be entered *nunc pro tunc,* or, indeed, that any judgment has been entered in this case upon the records of the Wakulla Circuit Court.—It was, to be sure alleged at the bar that it was understood and agreed by the attorneys of the respective parties, that it should be so entered. This, however, is not sufficient; but if such an agreement had been entered into in writing and filed by them in the proper

court, it may be very doubtful whether that, of itself, would have authorized an appeal from such judgment to have been taken *nunc pro tunc*. We are inclined to the opinion that it would not, and that, if appeal could have been taken at all upon such a judgment, a special agreement would have been necessary to have authorized it. But this question, not being now before us, we do not decide it—the time to do that will be when the question arises.

This court has appellate jurisdiction only, and that is to be exercised in cases brought up by appeal or writ of error from the several Circuit Courts—see Thompson's Digest, pages 50 and 51. No. 1 and No. 5. The judge, sitting in vacation, is not, for this purpose and in contemplation of these provisions, a Circuit Court, and no appeal lies, therefore, to this court, in such a case, from such a decision; and we are informed by the Judge who acted in this matter, that he would not have done so had he not understood that no appeal was intended; and, if we rightly comprehend his views, the decision that he made was, according to his understanding of it, rather an extra-judicial one. The only statute in this State which provides for appeals in cases at law, [and the common law afforded no such remedy,] may be found in Thompson's Digest, page 446, No. 1, and in Duval's Comp., page 108, sec. 1; and it declares that "If a party, in either of the Circuit Courts of this State, shall feel aggrieved by a final judgment, sentence or decree made or pronounced by any or either of said courts, it shall and may be lawful for such party, during the session of the court at which such judgment, sentence or decree is rendered or pronounced, or within ten days thereafter, to obtain, in court, if the appeal be made in term time, or in the clerk's office, if it be in vacation, his, her or their appeal to the Supreme Court of this State." No such appeal was thus taken or obtained in this case, and no record of the Circuit Court is brought up. Consequently, this Court has no jurisdiction in it, and the case must be dismissed.

Per curiam.

ISAIAH D. HART, APPELLANT, *vs.* ORLOFF M. DORMAN, APPELLEE.

When partial payments are made, the rule, with respect to interest, is to apply the payment in the first place to the discharge of the interest due at the time of payment. If the payment exceeds the interest, the surplus must be applied to the discharge of the principal, and interest is then to be computed on the balance of the principal remaining due.

When the payments are less than the interest, the surplus of interest unpaid is not to be considered as principal; but interest continues on the former principal, until the payment taken together exceed the interest due; and then the surplus of interest is to be applied to the reduction of principal, and interest again to be computed on the balance.

There is nothing in the statute of this State which makes this mode of calculating interest and applying partial payments improper—nor is there anything peculiar in that statute, or distinguishing it from the statutes of other States, where the rule is recognized.

Appeal from Duval Circuit Court.

The plaintiff, Dorman, brought an action of *assumpsit* to the Spring Term, 1848, of the Circuit Court for the County of Duval, against Hart, the defendant below. The suit was founded on a promissory note, on which partial payments had been made, and the interest was calculated according to the rule laid down in the opinion of the court, and the payments applied according to that rule.

At the Fall Term, 1848, of said court, Judge HAWKINS, presiding, plaintiff moved the court for a judgment by default in this cause; and it was ordered that said motion be granted, and that the clerk assess the damages—which having been done in accordance with the rule before referred to, judgment was entered for the plaintiff for the sum of two hundred and nineteen dollars and thirty-six cents.

From this judgment, the defendant feeling himself aggrieved, appealed to this court.

J. W. Bryant, for Appellant, contended,

1. That, under our statute, which provides that "no person or persons shall, upon any contract whatever, take, *directly or indirectly,* for the loan of any money, &c.," "a higher rate than eight per centum," "when no rate of interest is expressed," (Duval Comp., p. 78,) any computation which gives more than that rate, involves compound interest, and, therefore, any judgment rendered upon such computation, is illegal.

2. That several payments having been made *within* the term of one year, interest being computed to the time of such payment, and the amount of payment being deducted, left in each instance a new principal, *composed in part of interest,* which had accrued within the year; thereby interest was computed upon interest, within the term of one year.

The proposition that paying interest *only,* will finally pay the principal, is based upon the supposition, that the party to whom the interest is paid, permits the sum to be continually idle—for, if *invested,* of course it produces returns.

Thompson, for Appellees, contended,

That there was no error in the mode of calculating the amount of damages due for principal and interest in this case, and referred to the following authorities: Meredith *vs.* Banks, 1 Halstead R., 408. Connecticut *v.* Jackson, 1 John. Ch. R., 13-'17. Smith *v.* Shaw. adm., 2 Wash. C. C. R., 167. 17 Mass. R., 417. 1 Pick., 194. 3 Cowen, 86, n. 1 A. K. Marshal, 584. 2 Hayne, 17. Fonblanque on equity, 654, n., and other authorities there cited.

Chief Justice DOUGLAS delivered the following opinion:

This suit is founded upon a promissory note, upon which several payments were made after it fell due, leaving, however, a balance unpaid, for which a judgment was rendered against the defendant—from which he appealed to this court.

No errors have been assigned, and the only one alleged by the counsel for the appellant in the argument of the case, was as to the calculation of interest, and the application of the partial payments. How that was done is not stated in the record; but we understand, from the course of the argument that the payments were applied in the first place to the interest, and it appears from the record that they all exceeded it, unless it was one of nineteen dollars and eighty-two cents, *by bill rendered.* But it was insisted by the attorney for the appellant, that the interest should have been calculated upon the principal of an account stated, according to mercantile usage, and it is said in a note to Fonb. Equity, vols. in one, Ed. 1831, page 664 (side 440,) that "it is usual amongst merchants in stating their accounts, to let the principal continue upon interest, and to compute the interest upon the payments as they are successively made;" but t

annotator adds: "It is the debtor who gains, and the creditor who loses by this mode—for it is susceptible of mathematical demonstration, that a debt will be wholly extinguished in the course of a few years, (and the time will be longer or shorter, according to the rate of interest,) by the payments of interest, without paying a cent of principal; and Chancellor Kent makes the same remark, in the case of Stoughton *vs.* Lynch, 2 John. Chy. Reps., 214; and in Wasson *vs.* Gould, 3 Blackford Reps., 21, the court held that this mode is not correct—that it subjects the creditor to a loss which he ought not to bear, citing Stoughton *vs.* Lynch. In the case of the State of Connecticut *vs.* Jackson, 1 John. Chy. Reps., 17, Chancellor Kent held the rule for casting interest, when partial payments have been made, to be, to apply the payments in the first place to the discharge of the interest then due. If the payment exceeds the interst, the surplus goes toward discharging the principal; and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal, until the period when the payments, taken together, exceed the interest due; and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of principal as aforesaid;" and this rule is sustained by Penrose *vs.* Hart, 1 Dall., 378. Lightfoot *vs.* Price, 4 Hen. & Mumford, 431. Wasson *vs.* Gould, 3 Blackford, 21. Smith *vs.* administrators of Shaw, 2 Wash. C. C. Reps., 167 to 169. Williams and others *vs.* Houghtailing and Bevier, 3 Cowen Reps., 87, note A.—Fonblanque Eq., page 654, note above cited. Meredith *vs.* Banks, 1 Halstead's Reps., 408 & 409, *note.* Story *vs.* Livingston, 13 Peter's Reps., 871. Edes *vs.* Goodridge, 4 Mass. Reps., 103; and the United States *vs.* McLemoire, 4 Howard's S. C. Reps., 288. And this rule is (we think) more entirely free from objection than any other that has been adopted.

The interest was calculated, and the payments were applied, as we understand, according to this rule, in the case now under consideration; and we do not perceive how it gives compound interest. It is believed that there is nothing peculiar in the provision of our statute relating to interest, as the counsel for the appellant seemed to suppose; nothing which would make this mode of calculation of interest, and applying partial payments under it, give usurious interst;

nothing which would not be equally usurious interest under the statutes of at least twenty-six other States of this Union, which have been looked into and examined, including the States, the decisions of whose courts we have just now cited, and in one of which, it will be observed, the rule itself was laid down, and that, too, by one of her ablest jurists; and we have not been able to find, nor have we been referred to, a decided case, or any elementary work, in which the mercantile mode above stated is sustained; and in Meredith *vs.* Banks, 1 Halstead's Reps., 408, it is expressly repudiated, as well as in Wasson *vs.* Gould, 3 Blackford Reps., 21, above cited. The judgment of the court below is, therefore, in all things affirmed.

Per curiam.

BAZIL G. O'BRYAN, APPELLANT, *vs.* WILLIAM M. REED, APPELLEE.

When, by a separate agreement, any submission is intended to be made a rule of court, an agreement to that effect in writing must be signed by the *parties*, and filed in the office of the clerk of the court of which said submission is to be made a rule. An agreement signed by one of the parties is not sufficient.

When after an award is made, the parties agree to open it, and refer the matters in difference between them back to the arbitrators, the agreement so to do will be a fatal objection to a motion asking that the award be made a rule of court, and that judgment be entered theron and execution issue.—In such case, there is no award to be enforced.

Where the record shows admissions by the party seeking to enforce the award, that matters had been submitted to the arbitrators which were not adjudicated by them, and that others were adjudicated which they omitted to state in their award, the award, it would seem, should not be enforced, in the face of such acknowledgements.

If an agreement to open an award is signed by the attorney of one of the parties, though he had no authority, yet, if the party for whom he assumed to act subsequently ratifies the act, it is valid.

Appeal from the Circuit Court of Hamilton County.

The record in this case shows the following state of facts: The parties on the 13th of April, 1847, mutually executed bonds, and

agreed to submit all matters in controversy between them to arbitrators, to be indifferently chosen by them, which was done.

On the 23d of April of same year, the arbitrators, so chosen, made an award—by which among other things, they awarded to O'Bryan, the appellant, the sum of four hundred and seven dollars and ninety-seven cents.

At the foot of the bond of submission, signed by Reed the appellee, there is an agreement also signed by him, but not by appellant, to the effect that the award be made a judgment of the Circuit Court of Hamilton county.

Subsequently, the parties agreed to open the award, and to submit to the arbitrators all matters which they had failed to adjudicate, and all such as they had adjudicated, but had not set forth in their award. No other award was ever made by the arbitrators.

At the spring term, 1848, of the Circiut Court held in and for the County of Hamilton, the appellant, by his attorneys, moved that the bond of submission and award be made a rule of court, as stipulated and provided for in said bond, and that judgment be entered thereon and execution issue according to law. This motion being heard at the fall term of said court, the Hon. THOMAS BALTZELL presiding, was overruled.

From this decision the defendant prayed an appeal, which was granted.

Randall, for Appellant:

The record in this case sets forth the rule which was applied for and refused, and the refusal of which error is precidicated.

The stipulation that the award be made a rule of court, also appears of record.

The award was made and signed, 23d April, 1847, but no where does it appear when it was *published*—by delivery of a copy or other notice.

On its face and its terms it is *final* and *complete,* as respects the matters in controversy. It declares and decides, in the outset, that Reed is indebted to O'Bryan, in a certain sum absolutely due, viz: the sum of $407 97-100.

It then directs and awards certain acts to be done and omitted by plaintiff, O'Bryan, which we prove by his own affidavit, and by that of Purviance, one of the arbitrators, that he (O'Bryan) fully com-

ed with, doing what was prescribed to him, and omitting to do
hat was forbidden him in the award.
It is fully in proof, also, that defendant Reed, accepted at his
ands performance of the acts enjoined upon O'Bryan, such as the
return of the draft or order on Blood; that Reed also received the
benefit of the withdrawal or dismissal of the suit then pending
against him; that he held on to the joint chattels reserved to him
by the award, and the debts or claims due to the partners mutually
for lumber.
Thereis no evidence that defendant, Reed, has done one act, either
to comply with the terms of the award, or to set it aside by course of
law, further than by opposing the granting of this rule.
No motion or ruling was made or attempted in court to carry out
the provisions of the bond of submission, or to enforce or set aside
the award, until the rule entered by O'Bryan in February, 1848.
The cause of this delay, as appears by the proofs, was the effort
made by the parties (which failed through Reed's opposition) to settle
their dispute amicably, *on the principles of the award*, and without
invoking the aid of the court: *but we deny* that O'Bryan ever con-
sented or designed to give up or release the award made.
The *proposal* (for it in effect was no more) to *open* the award, to
make it "more in form"—not being legally executed by Reed, but
by the act of his attorney in signing his name to it being disavowed,
and found fault—was no more than a mere inchoate, unexecuted
project—not binding on either, and left the original award unimpaired
and in full force.
Moreover, it will be seen that such projected new submission di
not profess to do more than to make the original award more forma
and to extend to O'Bryan a longer time to return the order on Blo
or to indemnify Reed for his *non-return*—a matter rendered altoge
er useless and superfluous by O'Bryan's actual return of said or
as proved by Purviance. That proposed submission also prov
"that the award be entered on the docket of the court."
No new valid submission, then having been made—no
award allowed to be made by defendant—*the old award*, the or
in the cause, stood good, until *set aside*, on motion and proofs o
legality or insufficiency, by one or other of the parties.
In the court below it was objected, that the application for
late—that it should have been made at a prior term

the term next after the date of the award, viz: at the fall term, 1847.

To this objection we have a two-fold answer. One, a denial of the fact on which it is founded; and next, as to the law applicable to the fact assumed.

1st. We answer, the objection assumes (from the absence of proof) that the award was made when it bears date. This by no means follows: for *in legal contemplation,* until the parties are duly notified by delivery of a copy, if the submission so provide, or by *publication,* is of no award. 2nd Archbold's Prac., 1251, (note.) Watson Arb. & Aw., p. 131, last. Edn. p. 81, old edition. 2d Archbold's Prac., 1230.

Here, too, it appears in the proofs, that the award was *retained* or held back, by mutual consent and for further negotiations, which, however, ultimately led to nothing.

But, before proceeding to the other branch of the enquiry, viz: *the law applicable to the fact,* it may be convenient to dispose of another objection, which was, "that the submission should have been made a rule of court, prior to the award being made." This we respectfully deny to be the law in England, or in Florida. In England, under the statute 9 and 10th William III., sec. 15, (which corresponds substantially with our act of the Legislature on the same subject,) the *submission* and *award* may both be made a rule of court *at the same time.* Watson Arb. & Aw., p. 14, top. 27 & 8 margin, and cases cited. For the statute 9 & 10 Wm. III., sec. 15, see p. 13 & 14, Watson's old edition—p. 46, new edition.

The language of Watson is, "that where there is consent of parties to this effect, the statute has been construed largely," &c.; and "thus a consent in the arbitration bond to make the award a rule of court instead of the submission, will, it seems, warrant the interposition of the court under the act."

Let the court now compare the terms of the act of Florida, (p. 399 of Thompson's Digest,) with the statutes of 9 & 10 Wm. IIId., and it will be seen that they alike say, "That the *submission* shall be made a rule of court," &c. Yet such terms justify the parties, *when they consent,* to make the *award,* as well as the submission, a rule of court; and for the veryobvious reason, that the *award* in such a case becomes *part* of the submission, if not the very submission itself.

And now recurring to the first objection, that our rule was not entered in time, and waiving the answer, that *"non constat,"* when in legal contemplation the award was made, we answer as to the law.

2d. By denying that there is any thing in our statute, which imposes the duty *upon the party claiming the benefit of the award,* and *seeking its enforcement,* to have it entered a rule of court, at the term *next ensuing* the making thereof.

On the contrary, we hold, that the only provision of the statute, viz: the 4th section, limiting the time of filing a rule, contemplates and embraces the proceeding on the part of him who seeks *to set it aside,* and not of *him* who claims its benefit, and *seeks to sustain it.* See 4th sect., act Nov. 17, 1828, Thomp. D., 400. Duv. 236. Here it is manifest, that the time prescribed is *by way of* limitation, but it applies alone *to the party who moves to set it aside.*

If it be objected, "that the party last referred to could not make such motion before the submission and award were filed," we answer—that it is perfectly competent for either party to make such preliminary motion *to enter the rule,* with a view to the final action of the court, either to set it aside, or to establish it as the judgment of the court. The submission and award belong equally to both parties, and their rights are reciprocal.

It is laid down in Watson, (new ed., p. 265,) that the entering the submission a rule of court, is an essential preliminary to *any motion* touching the award. And in 2d Arch. Pr., p. 1253, it is laid down as the first practical proceeding to set aside an award.

Thus, then, Reed, who now objects to this award and seeks to set it aside, or *rather to treat it as a nullity,* should *himself* have made the preliminary motion or rule, to enter the submission, &c. to secure redress, if the award were liable to be impeached.

An award made under a submission by deed, stipulating that the same be made a rule, and become the judgment of a court of record, (as is the case before the court,) is a grave and solemn *act* and creates liabilities on both sides, which may not be lightly avoided, or escaped by inaction and neglect.

The statute of 9 & 10 Wm. III., and the Florida statute on the same subject, and in effect and substance the same, (the last being no doubt substantially copied from the first,) *both* limit the time to make motions to set aside awards; and by reference to Watson. (new ed., p. 269, old ed, p. 156,) and to 2d Arch. Pr., p. 1251, (Lon-

don ed.,) it will be seen that the utmost rigor is insisted on as *to time,* and scarcely an excuse allowed for delay, when the object is to defeat these salutary domestic judgments.

And now, as to the construction of the Florida act, where in the absence of *decisions* under that act, we must resort to analogous reasoning. By the 4th sec. of the Florida statute, (p. 401 of Thomp. Dig.,) the motion to set aside the award must be made at the term ensuing—that is, (it is conceived,) at the term next after the rule is entered, or at the same term, if ten days' notice of such motion can be given. But let it be borne in mind, that, under the doctrine and directions cited above, from Watson and Archbold, the defendant himself might have entered the rule of court, as his own pleasure and convenience, whereon to ground *a motion* to set aside the award. But relying as he did upon our taking the initative, and moving the rule, that section would have given him the whole of the spring term to make such motion.

Next comes the 6th sec., (Thomp. D., 401,) which provides that "if no motion be made to set aside any award, &c., it may be entered of record at the ensuing term of said court." "Ensuing term of said court?"—ensuing what?

Why, evidently, ensuing that term wherein the other party had time to the end thereof (the court not holding ten days) "to move to set it aside." This is certainly the most reasonable principle of construction, and one which assimilates this proceeding to all others, where time is given to a party *to object,* on *"rules nisi,"* or other proceedings.

No such rule can be made absolute—no interloctuory or other order or judgment be confirmed, until such time shall have elapsed.—The motion to confirm or make absolute is always postponed, until the time allowed to vacate or set aside shall have expired.

The language of the section is, "If no motion be made to set aside any award made as aforesaid, it may be entered of record at the ensuing term of said court, during the term thereof."

According to every rule of grammatical construction, the term "ensuing" must of necessity refer to the next and only antecedent. viz: "The motion to set aside the award," which, by the 4th section, must be made at the first "term ensuing the filing of the same."

Reason and grammatical construction, and uniform decisions under a similiar law, concur in this interpretation.

Suppose the counsel of Reed had moved at the spring term, 1848, after entering on the order book the rule moved by plaintiff, (and nothing we have seen prevented him from anticipating the action of plaintiff,) and had moved then "to set aside the award."

"*Es debito justiciae,*" or "*ex gratia*"—as a matter of legal right, or by indulgence of the court, (the term consisting of less than ten days,) that whole term would have been allowed him wherein to make such motion.

So, if *plaintiff* had, at the fall term, 1847, (the first term ensuing the making of the award, taking *its date,* and not its *publication,* as the test of when made,) then entered his motion to make the award a rule of court, he could not have had his rule made absolute, for the same reason, until the spring term, 1848, when he did apply for it.

But that motion being made first at the spring term, 1848, of necessity the rule or order to set up and establish must have been postponed until the next, or ensuing term, viz: the fall term, 1848.

The court will see that defendant has altogether failed at any time to move in the matter. He has availed himself of all the privileges and advantages of the award, (as our proofs exhibit,) he has thereby (we contend) waived all legal right of making said motion, or of impeaching the award, on any grounds, but of legal defects apparent on the face of the proceedings.

And now, on general principles, we would ask, what reason can apply for coercing a party seeking to obtain an award to this extreme diligence, in limiting him to a short day, wherein to enter his rule?

It is not usually the policy of the law nor needful, to oblige the creditor or claimant to use summary or stringent methods to obtain the benefit of his claim. His own interest and selfish feelings, in such case, usually require restraint, rather than stimulants to activity.

Our proofs further show and assign a satisfactory reason for the short delay; and not a suggestion has been made that defendant was injured thereby. Delay is what the debtor seeks as *beneficial,* what the creditor avoids as *injurious.*

The policy of England and of this country both concur in sustaining awards, the judgments of those cheap "domestic forums."—No stronger evidence of this is required, than the laws passed to encourage them, and the liberal and *enlarged* principles of construction applied to them universally.

The award and submission here are both in writing and under seal, and their evidence of a certain, durable character. Had they been by "parol," there might be reason for *urgency* in setting them up.

And yet awards may be made by *"parol,"* if the terms of the submission do not forbid it ;and it seems the courts can enforce the execution of parol awards by *attachment.* Watson on Arb. & Aw., p. 307, 81-'131.

So also the submission may be by "parol." Same p. 6. But it is conceded that neither in England, nor under our law, could such be made a rule of court.

But, again, we ask the court to regard the terms of this 6th section? They are—"it (i. e. the award) *may be* entered of "record at the ensuing term of said court."

The term, *"may be,"* is *directory* and *permissive,* not *imperative* or *restrictive.* The permission is for the advantage of the party seeking it. The statute states the *nearest,* but not the *latest* time for its exercise.

The legislature could not contemplate, that a party seeking to recover his debt would himself cause needless delay, nor would they be likely to deem any limitation of time in such case necessary.

Lastly, it appears that this time or delay was agreed to in this case as a mutual favor; and, further, that while the defendant has received all the benefit of the provisions of the award in his favor, plaintiff, by this very arbitrament and award, has parted with every thing, and received nothing.

W. P. Duval, for Appellee:

I. In this case no bill of exceptions is filed. Such facts only can becomes a part of the record and be brought before this court as are contained in a bill of exceptions. The exceptions must be taken and signed at the trial of a cause, unless further time for making them up be given by the Judge. 2 Tidd's Prac., 910, 911. 9 Wheat., 651. 5 Cond. U. S. R. 4 Peters, 102. 5 Id. 248. 4 How. 4, 198.

Therefore, the affidavit of B. G. O'Bryan and H. E. Purviance, the notice to Reed by O'Bryan, on page 2nd of the record, and the statement of facts by the clerk, on page 14, except that the motion was argued and disposed of, cannot be noticed by this court. Besides, such testimony is illegal in a proceeding in arbitration. The

ırt can have before it only the submission bond or agreement, the 'ard and the entires by the clerk of the proceedings on the record; .cept where motion is made to set aside an award, when the statute Duval, 236, sec. 5,) allows affidavits to be received.

II. The Appellant is not entitled to his motion that the award be nade a rule of court, because,

1 .There is no "award" on which the court can act. There is a writing, purporting to be a bond, by Reed, to submit to an arbitration, 13th April, 1847. An award was made, in pursuance thereof, signed 23d April. An agreement was then entered into between the parties, (endorsed on the award,) that the award should be opened, omissions inserted, various other material alterations made and, in fact, a different and new award made by the arbitrators. No such new award appears on the record. By the Appellant's own agrement, then, there is no award that can be made a rule of court.

But the appellant alleges that this agreement is void, because it is proved that Reed disavowed the authority of his attorney to sign the agreement. The evidence of this disavowal, he says, is in the affidavits. It has already been shown that the affidavits had no place in the record. Moreover, they show only that the affiant *understood from Peden that Reed denied his authority.* But Peden, as attorney at law, could submit the case to arbitration. 7 Cranch, 436. 4 Cond., 560. Buckland *v.* Conway, 16 Mass., 396. Talbor *v.* McGee, 4 Munroe Ky. R., 377. Evans *v.* Thompson, 5 East., 189.—3 East., 466.

2. If the agreement between O'Bryan and Reed be void and we take only the bond of Reed and the award in pursuance of it, there can be no rule entered.

There must be mutuality in a submission to arbibtration—a mutual bond or agreement. 2 Arch. Prac., 323.—The statute, (Duval, 236, sec. 2,) requires that the agreement be signed by the *parties.* They must both consent. There is no evidence of such mutuality of consent on the record. But one bond is filed, and that signed by Reed alone. If the consent of one only is sufficient, what would be the consequences? The one making it is liable on his bond in case he do not perform the award, and is liable if he choose to revoke his submission before award made and rule of court entered. 2 Arch. Prac. 324. But there is no bond or agreement to hold the one not consenting to the performance of the award. Should the award b

that he should pay money, judgment could not be entered against him. He has entered into no agreement that execution might issue against him . It can be issued only where he has made the consent *in writing,* and the rule is entered in pursuance of it. If the award be that the party signing the consent do something else than the payment of money, and he do not perform, he is considered in contempt of court and will be put in jail. Duval, 236. But he not signing his clear of any such consequences. The court has no hold on him. The record shows that he has not submitted to its authority. Such a one-sided proceeding would be contrary to the statute and to every principle of law.

3. This award can never be entered of record. The statute, Duval, 236, directs that it be entered at the *ensuing* term of court. It is attempted to be enforced the second term after it was made.—Where a party pursues a mode allowed by the statute he must comply precisely with the course it points out.

4. An award should be so plainly expressed that there would be no uncertainty as to the manner in which it is to be executed. Schuyler *vs.* Van Derbeer, 2 Caines, 235. See also 9 Johns., 43.

A part of the award is that "the order given O'Bryan by Reed, on Blood, (amount, one hundred and sixty-seven dollars and eighteen cents,) be returned to Reed within thirty days, or charged to O'Bryan and deducted from the above award." It is not *certain,* though probable, that the intention of the arbitrators was that $167 18 be deducted from $407 97. Other things respecting money are awarded after the $407 97, before this order on Blood is reached. There is a more material uncertainty. Shall O'Bryan return the order, or shall he have the option of having it charged to him by Reed. See Barnes, 166. Or is it to be returned to Reed within thirty days, and if not, then to be deducted from the award. This is a matter of speculation.

5. The award should have been final, which it is not. In Pedley *v.* Goddard, 7 Term R., 73, the defendant was to pay plaintiff a sum of money within twenty-one days, (which was after the time limited for making the award,) unless defendant should exonerate plaintiff, by affidavit, from certain payments and receipts. The award was held not to be final, and void. In this case the award on the order to Blood is also in the alternative and allowed to be performed within thirty days, which was after the time limited for making the award.

There is nothing certain or final as to "the order on Stewart."—Who is to have the order? Shall Reed? Probably. Has O'Bryan got it in his possession, and is he to deliver it to Reed? Suppose he has it; there is no award that he deliver it to Reed.

The award is, in respect to other matters, uncertain, defective and not final, and therefore void.

The agreement endorsed on the award shows that it was otherwise defective and incomplete. The admission of O'Bryan, to this effect, is equal to an affidavit to set aside the award, or an admission of mistake by the arbitrators.

6. Where there is no cause in court, the award, as to costs, depends entirely upon the terms of submission. If the submission gives the arbitrator no authority as to costs, he cannot award them.—Arch. Practice, 228. In this case no such authority was given.

Randall in reply:

In answer to the first point taken by counsel for appellee, it will be sufficient to say that there was no occasion whatever for a bill of exceptions. The ruling of the court appealed from was a motion in writing, founded on specialties and sustained by affidavits, with a view to a statutory remedy. Thomp. D., 399.

By reference to English works touching the enforcing of the performance of awards, (2 Arch. Prac., 1255,) it will be seen that affidavits are required from parties seeking the enforcement. And this answers the assertion on the other side that affidavits are only admissible on the part of him seeking to set aside the award.

The terms of the 5th section of the Florida statute, (Thomp. Dig., 400,) repudiate this motion.

As to the second point taken by counsel for appellee, the argument [illegible] a sufficient reply. So, also, with regard to

for Hamilton county, made at the last Fall term, overruling a motion which had been entered upon the order book of said court; and a bond of submission and award, filed 17th day of February, 1848.—This motion was at the spring term of that year continued until the said fall term, and is in the following words, to wit: *"Ex parte.*—Basil G. O'Bryan, in a matter of arbibtration between Basil and William M. Reed, Middle Circuit of Florida, Hamilton Circuit Court. Motion that the said bond of submission and award be made a rule of court, as stipulated and provided for in said bond of submission, and that judgment be entered thereon and execution issue according to law."

The first section of our statute, entitled an act concerning arbitration and awards, (Duval's Comp., 255, Thompson's Dig., page 399,) provides for submitting matters of difference, &c. to arbitration, and declares that the parties to such admission "may stipulate and agree either in the bond, &c. of submission, or by a separate agreement, that said submission and arbitration shall be made a rule of any court in this State;" and the 2d section enacts, "That when any submission is intended to be made a rule of court as aforesaid, an agreement to that effect in writing, *signed by the parties*, shall be filed in the office of the clerk of the court of which said submission is to be made a rule, and the clerk shall enter said rule."

The motion was made by the appellant, and it appears by the record of the proceedings in the cause, including certain affidavits filed by the appellant in the court below, (but which the appellee by his counsel insists are not a part of the record, because they were not brought into it by a bill of exceptions,) that, on the 13th day of April, 1847, the parties to this proceeding, under bond mutually executed by them, agreed to submit all matters in controversy between them to arbitration—that arbitrators were mutually chosen by them, to whom those matters were submitted, and that said arbitrators, on the 23d day of April, 1837, made an award.

At the foot of the submission bond of the appellee, the only one in the record, is the following, viz: "And it is further agreed that said award be made a judgment of the Circuit Court of Hamilton county, and said State"—which agreement is signed by (Wm. M. Reed) the appellee.

Whether such an agreement was appended to the bond by O'Bryan or not, the record does not show; and there is no authority to enter

such a rule, unless the agreement to that effect in writing, *signed by the parties,* be filed; at least such is the express provision of the statute ,from which we should not be inclined to depart, without some good cause shown, (if at all.) Here no cause is shown—it does not appear that there is any such agreement signed by the parties; or if, upon the equity of the statute, separate agreements signed by the parties were sufficient, and we were at liberty to presume that O'Bryan had signed one at the foot of his bond; it is not shown that any effort was made to have it filed in court. If, therefore, such an agreement was signed by O'Bryan, it cannot effect the case; but besides this, although the motion to make the submission and award a rule and judgment of the court, is alleged to have been made pursuant to that agreement, and substantially in accordance with it, yet we find by reference to the record, that, after the award was made and published, an agreement was entered into by and between the parties, that it should be opened and the matters referred to the same arbitrators, to make a new award; and that it was thus referred back, and one of the arbitrators, (Mr. Purviance,) whose affidavit was taken and filed by the appellant in the court below, in support of said motion, states that he did, at the instance of the said O'Bryan and Peden, acting as attorney for Reed, make out the *draft* of another *award,* but the said draft was never executed or signed by the arbitrators.

It has been objected on behalf of the appellant, that there is no evidence to show that said Peden had any authority from the appellee to make the said agreement to open the said award, and that the appellee disaffirmed the agreement, and denied his authority to make it; but in looking into the affidavit of Mr. Purviance, before mentioned, which contains all that is said in the record of any such disaffirmance and denial of authority, we find that he states as follows, viz: After stating that the arbitrators under the bond of submission mutually executed between them ,said O'Bryan and Reed, dated the 13th April, 1847, made an award, which was designed to be a final award at the time, goes on to say, "That subsequently the parties met at the house of the affiant, for the purpose of further negotiating touching said award, with a view to explain away obscurities in it, (if any such existed,) and to extend the time for O'Bryan to return the order on Blood, or make indemnity for the same." "That, at such meeting, *Reed was represented by James A. Peden. Esq., his*

attorney, who made and signed an agreement touching the award, which affiant afterwards understood from Peden that Reed disaffirmed, and denied his (Penden's) authority in the premises." Now the latter clause, "which affiant afterwards understood from Peden," &c., is all that the record discloses of the disaffirmance and denial of Peden's authority by Reed; and that, it will be observed, is hearsay testimony only, and is opposed by the statement of Purviance himself who says Reed was represented by *James A. Peden, Esq., his attorney,* and by the action of Reed in relation to this matter, who, when this motion came on to be argued in the court below, objected to any judgment on the award, and assigned amongst other reasons this :"because by the terms of the agreement atached to the award the same was opened, and another was to be made, thereby sustaining this statement of Mr. Purviance, and recognizing and affirming the acts of James A. Peden, Esq., *as* his attorney in the premises; and now, in this court, he again recognizes and re-affirms it, by objecting to a reversal of the judgment rendered by the court below in this case, upon the same ground. It is a familiar principle, that "the acts of one having no authority will be made valid by the ratification of the person for whom he assumed to act." Lent *v.* Padleford, 10 Mass. Reps., 230, 236, Odiorne *v.* Maxey, 13 Mass. Reps., 179, 192. Wood *v.* Carpenter, 4 Wendell's Reps., 219. Baker *v.* Byrne, 2 Smedes & Marsh, 193. A principal may recognize an authority, *"ex post facto,"* and makes the act his own. Haggles *v.* Washington County, 3 Miss. Reps., 496. 3d U. States Dig., 244. 2 Kent's Comm., page 478.

By this agreement, the award was opened, and, therefore, there is now no award to be enforced, and this of itself is a fatal objection to so much of the motion as asked to have "the award made a rule of court, and that judgment be entered thereon and execution issue," and saves us the necessity of enquiring whether this would have been the proper mode of enforcing such an award, of looking into the other objections against it which have been presented for our considedation.

There is one matter, however, in relation to this award, which we deem it proper for us to notice, which is, that, by the agreement to open it, the parties agreed "that the arbitrators insert all matters which they *have omitted,* in the purview contained, and which they *have adjudicated, but omitted to set forth.*" This agreement, it is to

be observed, is signed by the appellant, and if it were not valid as an agreement to open the award, for lack of authority in Peden to make it, still it would seem to be a sufficient acknowledgment by the appellant that matters had been submitted to the arbitrators, which were not adjudicated by them, and that others were adjudicated, which they omitted to state in their award, and with such omisisons before us acknowledged by one of the parties, we should hesitate much before we should make an order to enforce the award against the other: for that an award does not embrace all matters submitted to the arbitrator, is one of the very reasons assigned in the books for setting it aside. Watson on Arbitration and Award, 159, 8 Law Lib. Whether the affidavits referred to are properly a part of the record or not, is of no importance to this case, as our decision would have been the same, had they not been in it. We looked into them to as certain if they really contained any legal and substantial proof of the alleged disaffirmance and denial of Peden's authority by Wm. Reed, the appellee. Had they done so, we might have left ourselves constrained to examine that question. Finding, however, that they contain no such proof, and that the hearsay evidence on the subject is more than neutralized by the positive statement of the same witness, and what is of more importance, the authority of Mr. Peden having been fully recognized and affirmed by the appellee, and no agreement, such as the statute prescribes, to make the submission a rule of court, having been filed, we can perceive no error in the judgment of the court below.

If such an agreement had been filed, or if it had been clearly shown that an agreement to make the submission or award a rule of Hamilton Circuit Court had been appended to the bond of Mr. O'Bryan, the appellant, and that he was unable to file it from the fault of the appellee, or his refusal to permit him to do so, or at least without any fault on his own part, we are not prepared to say but that the motion ought (under such circumstances) to have been so far sustained, as to have permitted the rule to be entered, to stand until a new award should be made. There seems to have been no time limited in the agreement to open the award, within which the new one was to be made; as no such agreement was filed, and no such proof was shown, it is unnecessary for us now to decide that question. For reasons stated, the judgment is affirmed.

Per Curiam.

RICHARD H. BRADFORD, ADMINISTRATOR, ET AL., APPELLANTS, *vs.* WILLIAM MARVIN & NOAH M. MARTIN, APPELLEES.

The right of the vendor to an equitable lien upon the lands sold is a right that exists, but may be waived, if the vendor takes a collateral security, binding others as well as the vendee.

The taking of separate or independent security, if it is not *pre se a waiver of the vendor's lien*, is at least *prima facie* evidence of such waiver; and the *onus* is upon the vendor, to show that it ought to have that effect.

Where the vendor simply takes the note or bond of the vendee, and makes a conveyance, he retains a specific lien upon the land, subject, however, to be defeated by the intervention of creditors or purchasers without notice.

Where the vendor has parted with the title, the surety has no right to claim to be substituted to the rights of the creditor, unless he has paid the money—and even then, he has no greater rights than the creditor himself had.

The surety may compel a sale of the lands to save himself harmless, where the title has been retained by the vendor.

Marvin and Martin, in the year 1844, filed their bill of complaint in the late Superior Court of St. John's county, against Mary Eliza Read, Teresa Bellamy Read and Richard H. Bradford, administrator of the estate of Leigh Read, setting forth and showing that, on the 12th day of March, eighteen hundred and thirty-nine, the said Marvin was seized and possessed of three thousand five hundred acres of land, being a part and portion of an undivided tract of four thousand acres, ceded by the Spanish Government to one Don Francisco Roman Sanchez, and described in said cession as being situate ten miles to the westward of the Alachua road, leading to St. Mary's and bounded on the north by the Sante Fee river, and on the other sides by vacant lands, and since surveyed under the authority of the United States, and lies in township six and seven south, range eighteen, and is known upon the plat of said survey as the claim of Francis R. Sanchez, and which said premises are situate in the county of Alachua, in the Eastern District of Florida aforesaid; and was also at the same time aforesaid seized and possessed of an undivided estate and interest of, fifteen hundred acres, being part and parcel of another tract of land, containing two thousand acres, ceded by the Spanish Government to one Don Jose Simeon San-

chez, and described in said cession as being situate on the Santa Fee river, and bounded on the west by lands of Don Francisco Roman Sanchez, and other sides by said river, and which has since been surveyed under the authority of the United States, and lies in township six and seven south, range eighteen, in the county of Alachua, and is known upon the plat of said survey as the claim of Jose S. Sanchez and others. And that the said Marvin being so seized and possessed as aforesaid, did, on the day aforesaid, bargain, sell and convey to one Leigh Read, of the county of Leon, all of his estate and interest in the said two tracts of land, for the consideration of five thousand dollars, *to be paid* at five years, with annual interest, and *did receive at the time* of said sale and conveyance the promissory note of said Read, and of Noah M. Martin, as his surety, for the said sum of five thousand dollars, payable five years after date, with interest annually.

That one year's interest on said note or purchase money was paid by the said Read at the time it became due, and that no part or portion of the principal of the said note or purchase money, or of the interest thereon, except as above stated, was ever paid by the said Read in his lifetime, or by his representative since his death, or by any other person, and that the same is still due and owing.

That Noah M. Martin was induced to become the surety of the said Read, for the payment of the said purchase money, in the full reliance and expectation that the premises purchased by him would always be worth the price agreed to be given, and that the proceeds of a sale of them would always in equity and good concience be held and considered by the said Read, and by the law of the land, as a sacred fund, for the payment of the said purchase money, in preference to any other debt or claim against the said Read.

Since the sale and conveyance aforesaid to the said Read, and the giving of the said note, to wit: Sometime about the year eighteen hundred and forty, the said Read died seized of the said premises and intestate, leaving heirs surviving, his widow Mary Eliza Read, and an infant daughter named Teresa Bellamy Read, his only heir at law, both of Leon County, in the Territory aforesaid; and that one Richard H. Bradford, upon the death of said Read, was duly appointed the administrator, and is now the administrator of the estate of the said Read.

That the said purchase money has sometime since become due,

and he has frequently applied to said administrator in a friendly manner, and requested him to pay and discharge the principal and interest thereof, but that the said administrator refuses so to do, and has informed your complainant that the estate of the said Read is insolvent, and that he has not assets in his hands to pay the said purchase money.

That in equity and in good conscience the said lands ought to be held and considered in the hands of the said administrator, and in the hands of the said Teresa Bellamy Read, as a fund for the payment of the said purchase money, in preference to any other claims against the estate of the said Read; and praying that the premises aforesaid may be decreed to be sold, and out of the moneys arising from the sale thereof, he, the said Marvin, may be paid the amount which may then be due him, as and for the purchase money aforesaid.

In 1846, this cause having been transferred to the Circuit Court of St. Johns county, Richard H. Bradford filed his answer, insisting that there was no equity shown in the bill; admitting the sale and conveyance, and the execution of the promissory note, signed by Read and Martin, and averring that the estate of Read was hopelessly insolvent. That judgments for large amounts had been recovered against him as administrator, and that said judgments had priority over the claim of Marvin, the complainant; that he had no assets except the lands mentioned in complainant's bill, and some other property of small value; that the widow claimed dower in the lands, and that her claim was to be preferred to others. A separate answer was also filed by the widow; and the infant heir answered the bill by her guardian appointed for the purpose.

In June, 1847, a final decree was made in the cause, by the Hon. THOMAS DOUGLAS, Judge, as follows:

"This cause coming on to be heard this day, and the said parties complainant being represented before this court, by Messrs. Forward and Fairbanks, their Solicitors, and the said defendants being represented by S. L. Burritt, Esq., their Solicitor, and the bill, answer and evidence in this cause having been read, and argument thereof had, as well on the part of the said complainants as on the part of the said defendants, and the cause having been submitted to this court for its decree and determination, and this court having maturely considered the same, doth order, adjudge and decree, that

the lands described in and set forth in the bill of complaint, and whereof conveyance was made to said Leigh Read, deceased, by said William Marvin, on the 12th day of March, eighteen hundred and thirty-nine, are and hereby declared to be subject to the lien of the said complainants for the purchase money thereof; and that the said lands are and shall be deemed to be held by the defendants, subject to such lien, and as a trust fund, out of which the note given by the said Leigh Read, deceased, and Noah M. Martin, for the purchase money, shall be first paid, in preference to any other debts or claims against the estate of the said Leigh Read, deceased.

"And, it is, therefore, further ordered, adjudged and decreed, that, unless the said Richard H. Bradford, administrator of Leigh Read, as aforesaid, shall or do within sixty days from this date, pay or cause to be paid unto the said complainant, or his solicitor or solicitors, the amount due upon said purchase money which hath been reported, upon reference of the same to the clerk of this court, as special master, to be the sum of five thousand, nine hundred and eighty-five dollars and eighty-three cents, with interest from the date hereof until paid; that the said premises mentioned and described in the bill of complainant shall be sold by or under the direction of the sheriff of the county of Alachua, by virtue of this decree, in the same manner and under the same notice and advertisement, as required by law in case of sales of real estate upon judgments and execution at law, and that the said sheriff execute a deed of said premises, and put the purchaser or purchasers in possession thereof; and the proceeds of such sale shall be applied first to the payment of the taxed costs and expenses of this suit, and then to the satisfaction of the purchase money and interest aforesaid; and the balance, if any, shall be paid to the said R. H. Bradford, as administrator of Leigh Read, deceased."

From which decree, defendants appealed to this court.

Branch and *Burritt* for Appellants:

The doctrine that the vendor has *a lien upon the land sold* for the purchase money is derived from the civil law. Although it seems to settled and acquiesced in, in England and many of the States of this Union, its introduction was resisted in America until a comparatively recent period. Its policy may be well doubted, and in some States, as in Massachusetts, Connecticut, Pennsylvania and North Carolina,

the doctrine has either been rejected altogether, or exploded after trial.

The decision of this court will determine whether it is to be adopted in this State and form a part of its laws. It is a new question in this State; and this court, being in no way hampered by former decisions, is at liberty to decide as its wisdom shall deem best for the welfare of the State. It being no part of the *common law*, there is no obligation to adopt it, unless its own merits are such as to recommend it.

The spirit of our laws is decidedly against all *secret trusts, liens and incumbrances*. Hence our registration laws, which require all conveyances, incumbrances, trusts and liens on land to be recorded, so that the world may have notice of them. These provisions of the law are to enable purchasers and others to act understandingly, and prevent a person in possession of land from obtaining credit on what does not really belong to him. The doctrine that the vendor has an implied lien on the land is in direct opposition to these wise and wholesome provisions. It allows a vendor to have a mortgage, (as it were,) *secret*, and the existence of which can only be known to the vendor and vendee. It raises a *secret* or *implied trust* in favor of the vendor, which lies dormant and has no tangibility, until called into existence by a court of chancery. Such a doctrine not only, in many instances, works great injury, but is calculated to promote and produce litigation. The vendee being in possession and having an absolute deed, may sell to a third party whose utmost caution could not detect the secret lien existing upon it; and thus he would buy a law suit even if he did not lose the land.

It also enables the vendee to obtain a false credit by hiding from the eye of the world the encumbrance on his estate.

If the vendor wishes to retain a lien on the land sold, our statute has pointed out the manner in which it may be done. How far it is competent for this court to evade that statute by allowing it to be done in another and a different manner, it is not necessary in this case to inquire.

In the case before the court it is not necessary to discuss whether this doctrine of an *implied lien* of the vendor should be recognized or discarded; for the facts and circumstances of it are such as to take it out of the principle, admitting it to exist.

Admitting, then, that the vendor has a lien on the land sold for the

purchase money, all the authorities agree that this lien *can be waived by the acts of the vendor.*

Appellants contend that he has waived it:

1. By taking the bond or promissory note of the vendee.

The court will find that the only questions which have been discussed or mooted in the courts of England are, first, whether the lien existed at all, and, second, whether the taking of a separate security as the bond or note of the vendee, without security, was not a waiver. It will find, also, that whilst it has been decided *that a lien existed* the question whether taking a bond or note without security is a waiver is still open and undecided. The following cases, decided in England and America, take the ground *that the taking of a separate security, as the note of the vendee, without security, will be a waiver.*

The case of Winston *v.* Anson, in 1st Simons & Stuart, cited below, is the latest in England, and of the highest authority. Winston *v.* Anson, 1 Simons & Stuart R., 434. Tarwel *v.* Heelis, Amb. R., 734. Nairne *v.* Prowse, 6 Vesey R., 752. Wragg *v.* Comptroller General, 2 Dess. S. C. R., 509. Womble *v.* Battle, 4 Iredell E. R., 182. Kauflett *v.* Bowen, 7 Serg. & Raw. R., 64. Semple *v.* Burt, Ibidem. 6 Conn. R., 464. 17 Conn. R., 583.

2. Appellants contend: That Marvin, the vendor, by taking the negotiable promissory note of Read, with Martin as security thereon, and payable at *the expiration of five years,* waived the lien which he might have had on the land.

All the authorities agree that taking the promissory note of the vendee, with a third party as security, is a waiver of the lien. There is not an authority to the contrary. 4 Kent's Comm., 151 and 152. Fish *v.* Howland, 1 Paige R., 20. Gilman *v.* Brown, 1 Mason C. C. R., 191. Brown et al *v.* Gilman, 4 Wheat R., 255. 4 Cond. R., 445. Cox *v.* Fenwick, 3 Bibb R., 183. Cole *v.* Scott, 2 Wash. R., 141. Wilson *v.* Graham's Ex., 5 Munf. R., 297 Hardin R., 48. 1 Blackf. R., 416 and 246. Eskridge *v.* McClure and Walker, 2 Yerger, 84. 3 Alabama (N. S.) R., 302. 5 Hammond R., 35. 2 Story's Equity, (sec. 1226, &c.) pages 471—6.

3. Appellants contend: That the court erred in giving the lien of Marvin, if he had any, a preference over the judgment creditors of Read.

It appears from the bill and answer that the estate of Read is insolvent, and the answer expressly sets forth that there was a large

number of judgments against the estate of Read. Bayley v. Greenleaf, 7 Wheat. R., 46. 5 Cond. R., 229.

The statute requires all conveyances, mortgages and transfers of any interest in real estate *to be recorded, to be good against creditors.* Thompson's Digest, 180.

4. The appellants contend: That the court below erred in not allowing the claim of Mary Eliza Read, widow of Leigh Read, *to dower* in said lands.

The claim to dower vested in the widow, immediately upon the execution of the deed to Leigh Read, her husband. It became a *legal claim,* and cannot be postponed to the claim of the vendor, which is *merely equitable.*

The statute points out the only mode in which her claim to dower can be divested. Thompson's Digest, 179.

Forward and Marvin, for Appellees:

The bill states that the complainant (Marvin) in 1839 sold a tract of land in Alachua county to Leigh Read for $5,000, payable in five years, and took Reed's note, with the other complainant (Martin) as surety on the note for the purchase money. Reed afterwards died, having paid no part of the purchase money, and the heir and administrator refusing to pay for the land, this bill is filed to subject the land to the payment of the purchase money. The principal facts are admitted in the answers.

The complainant's counsel contends—

1st. That the vendor of real estate has in equity a lien upon the land for the purchase money, as against the vendee and his heir and representative.

This lien is created by law, and is an actual interest or right in the land, which cannot be lost or impaired but by agreement. 2 Story's Commentaries on Equity, 462-'3, 475. 15 Vesey Jur., 329. (Sumner's edition.) 1 Schoales & Lefroy, 132. 6 Vesey Jur., 759, 760. 1 Johnson's Chancey, 308. 9 Cowen, 316.

2d. The taking of Martin as surety upon the note does not by itself extinguish the lien or waive it. The lien, which is a vested right, can be extinguished, lost or waived, only by the *agreement* of the vendor, which agreement is not to be *implied* or *presumed,* but proved *as a fact.* The inquiry is, as to the *fact* of an *agreement* on the part of the vendor to waive his lien. If there is *no agreement.*

then there is no waiver. The *vendee,* relying upon the waiver, must prove the *agreement* to *waive.* 2 Story's Equity, 469. 1 Schoale & Lefroy, 132.

The taking of Martin as surety is only evidence, *testimony tending* to prove another *fact,* the agreement to waive, and is not sufficient ALONE and without other circumstances, to establish the fact that the vendor *agreed* to waive the lien. 2 Story's Equity, 469. 15 Vesey, 329, great case. 3 Russell, 488, in 3 Cond. Eng. Chancery, 495. 1 Schoales & Lefroy, 132. 1 Brown's Chancery, 372, note A., to the case of Blackburn *v.* Gregson, (Perkins' American edition.)—2 Ves. & Bea., 306. 9 Cowen, 316. Cross on Law of Lien, 89, 90, 91, 92, 93.

The case of Gilman *v.* Brown, in 1 Mason, 212, is new and unprecedented. It is the opinion of an able judge, but unsupported by previous authorities, and was uncalled for by the facts of the case.

3d. The surety (Martin) is entitled to have the land sold. Stump *v.* Rogers, 1 Ohio Reports, 225. Green *v.* Crocket, 1 Dev., and Batt. Eq., 390. Arnold *v.* Hicks, 3 Iredell Eq., 17. 1 Randolph, 53. 1 Deveraux, 151. 2 Bland's Chancery, 199, note C.

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HAWKINS, Justice, delivered the following opinion:

The questions arising in this case for the decision of the court are these: 1st. Can a vendor enforce a specific lien in equity against a vendee for the land sold, the vendor giving the vendee an absolute deed in fee simple, and, in return therfor, taking the promissory note of the purchaser, with a third person thereon as security?

2d. Can the surety, without having paid the purchase money, be entitled to have the lands (so sold) set apart as a specific fund for the payment of the note?

We have given the subject the consideration due to its importance, and more especially as it is the first case that has arisen in our courts involving a solution of the above propositions.

The right of the vendor to an equitable lien upon the property sold, seems to have derived its source from the civil law, and constituted what was termed a *tacit hypothecation,* or secret mortgage. It has been much discussed in the courts of England and in this country, and the doctrine exists and is fully sustained in England and in most of the States of the Union; but difficulties have arisen out of the

question, what shall constitute a waiver of the implied lien? This, indeed, is the very question before the court.

During the argument, all the British cases *pro* and *con*, both before the Revolution and since, having a bearing upon the question, were cited and commented upon with great ability, and it seems they cannot be very easily reconciled with each other. Judge Story, however, remarks, in Gilman *v.* Brown, that "on a careful examination of all the authorities, he does not find a single case in which it has been held, if the vendor takes a collateral security, binding others as well as the vendee—as for instance a bond or note with a surety or an endorser, or a collateral security by way of pledge or mortgage—that ,under such circumstances, a lien exists on the land itself." If such be the case, the American authorities are not *contra* but *ultra* merely those of England.

Without going into detail as to the British authorities, it will be sufficient as to them to quote the neat and precise summary of Chancellor Kent. He remarks: "It has been a question much discussed as to the facts and circumstances which would amount to the taking of security from the vendee, so as to destroy the existence of the lien. In several cases it is held, that, taking a bond from the vendee for the purchase money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived; but the weight of authority and the better opinion is, that, taking a bond, note, or covenant from the vendee for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are only the ordinary evidence of the debt. Taking a note, bill, or bond, with distinct security, or taking the distinct security by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon independent security; and it discharges the lien. Taking the deposit of stock is also a waiver of the lien, and, notwithstanding the decision of the Master of the Rolls, in Grant v. Mills, holding that a bill of exchange, drawn by the vendee, and accepted by him and his partner, did not waive the lien, the *sounder doctrine and the higher authority is*, that, taking the responsibility of a third person for the purchase money, is taking security, and extinguishes the lien." 4th Kent's Com., 152, 153.

The text of Chancellor Kent is fully sustained by the American authorities. Indeed, so far as we have been able to extend our re-

searches, there appears a uniform current of decisions going to establish the doctrine, that the taking of independent or collateral security is a waiver of the lien.

In Virginia, it has been decided directly; Judge Pendleton observing, that, "If he (vendor) hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost." Cole *v.* Scott, 2 Wash. Reps., 141. So, too, in the case of Wilson *v.* Graham's Ex'rs., 5 Mumford, 297, 299. 2 Tucker's Notes, 454.

The doctrine of lien and this principle of waiver certainly exists in several other states, viz: Tennessee, Ohio, Kentucky, Alabama, Georgia, Indiana, Mississippi, New York, and probably others beside. See Eskridge *v.* McClure & Walker, (Haywood & Whyte Justices,) 2 Yerger Rep., 84. Williams *v.* Roberts, 5 Hammond R., 35. Cox *v.* Fenwick, 3 Bibb., 183. Hardin Rep., 48. 3 Alabama (N. S.,) 302. 3 Kelly's Georgia Rep., 345. 1 Blackford, 249, 416, *Evans v. Goodlet.* Lagon et. al., *v.* Badallet and others. Clower *v.* Rawlings, 9 Smedes & Marshall, 128, and Fish *v.* Howland, et al., 1 Paige Ch. R., 20, where the British authorities are all reviewed, and the subject ably discussed by Chancellor Walworth.

Judge Story, a portion of whose opinion we have already quoted, (Gilman *v.* Brown, 1 Mason, 191,) has given the sanction of his name—a name carrying with it the greatest possible respect and veneration—to this principle of waiver, by the taking of collateral security. The case of Gilman *v.* Brown was taken to the Supreme Court of the United States, where the doctrine of Judge Story, as to this waiver received confirmation from that court, Chief Justice Marshall delivering its opinion. He remarks: "The notes, too for which the vendors stipulated, are to be endorsed by persons approved by themselves. This is a collateral security, on which they relied, and which discharges any implied lien on the land itself for the purchase money. We think this, on principles of English law, a clear case of exemption from lien." Brown *v.* Gilman, 4 Wheat, 455. We have already seen that Chancellor Kent adopts an adverse principle to that of Lord Eldon, as to waiver of the lien, and coincides with the Supreme Court and Judge Story.

With such an array of opinions and decisions pronounced by judges, eminent for all that is great and illustrious in jurisprudence, a court can feel no diffidence, difficulty, or solicitude, as to arriving at a proper conclusion.

We are not prepared, however, to go as far as some decisions, which declare, that the taking separate or independent security is, *per se*, or *ex proprio vigore*, a waiver of the lien of the vendor upon the land sold; but we adopt the maxim of *in medius res* as most conducive to justice, and say this, that where a separate or independent security is taken by the vendor, other than the personal security of the vendee, it is *prima facie* evidence of a waiver of the equitable or implied lien upon the land sold, and the *onus* is upon the vendor to prove that it ought not to have that effect.

To enable vendors and purchasers to understand their respective rights, it is certainly well that some explicit and general rule, one easily understood and as easily followed, should be declared; thereby obviating in numerous instances the necessity of a resort to a Court of Chancery by parties, to have their several rights subjected to the construction of that court, upon the varying and peculiar circumstances of each particular case.

We may here be permitted to remark, that such a rule seems based upon sound policy. It is very true, that when an individual parts with his land, he should receive the purchase money—that is sheer justice; and as long as he indicates by his act—for instance, the simply taking the bond or note of the purchaser—that he relies upon the land itself as a means of payment, the law says, he shall retain a specific lien upon the property sold, subject, of course, to have it defeated by the intervention of creditors or purchasers without notice. But when he carves out an independent security for himself, in exchange for the land sold—when he creates for himself a distinct and separate fund to which he can look for payment—when he gives an absolute deed for the land, thereby rendering it subject to other claims and the contingency of sale, it does appear that the vendor has no right to complain. The evil, if any, is easily averted by ordinary care, either by taking a mortgage, which on being recorded is notice to all the world, thereby carrying out the policy of our registration laws, and in many cases preventing third persons from giving credits to the vendee, on the faith and security of the very land sold; or by retaining the title, simply giving a bond for a conveyance, upon the payment of the purchase money. These modes are familiar to every one, and generally are pursued in those every day transactions when real property is bought and sold. If the mode and manner of payment are all that are intended by the taking of a

note, with an endorser upon it, it would seem they would be sufficiently indicated without invoking the liability of a third person, who frequently would feel that his contract was something more than mere form; and certainly the simple note or bond of the purchasers would be quite sufficient to set forth the amount, place and time of payment.

It is said, too, that because a party takes one security, it is not a *sequitur* that he relinquishes another. Very true, but then let him fashion his contract accordingly, and thereby rebut the inference and presumption raised by the law; unless he do so, in the words of Judge Story, "the rule may properly apply, that *expressum facit cessare tacitum,* and where the party has carried out his own security, the law will not create another in aid." This was manifestly the opinion of Sir William Grant in a recent case, where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien?"

An argument upon the plea of the justice of the case was strongly pressed and urged upon the court. Such an appeal must, at all times, commend itself most favorably to the consideration of a tribunal, whose duty it is to mete out even-handed justice to the parties litigant before it. But the court cannot enforce a legal or equitable right, where it is clearly waived; and more especially where the rights of third persons are concerned, as the record in this case clearly shows. The administrator of the estate of Reed possesses the character of a trustee for all interested or having claims against it, and he states that there are heavy judgments. Though that fact has exercised no influence upon our decision, yet it affords an argument by way of response to the plea of justice, so strenuously contended for; for where there is equity, there must be equality. Arguments, too, upon the hardship of a case are, Chancellor Kent says, "the quicksands of the law," and if allowed to prevail, would soon choke up and destroy all established precedents.

As to the second proposition, we are not aware that the surety, Martin, can successfully invoke the aid of a court of equity to set apart the land sold by Marvin, as a specific fund for the payment of the purchase money, where the vendor has not retained the title, but parted with it absolutely, and where also the surety has not paid the money or any part of it.

Courts of equity hold sureties, entitled *upon payment* of the debt due by the principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt. 1 Story's Com., 477. So the surety, who *has paid the debt of the principal,* is entitled to stand in the place of the cerditor, as to all the securities for the debt held or acquired by the creditor, and to have the same benefits from them as the creditor. Pr. & Sur., 252. Bing. on Surety, 352.

The surety, if he has apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, may file his bill, *quia timet,* to compel the debtor to discharge the debt, provided the surety's obligation to pay has become absolute. So he may compel the creditor to sue the principal, and collect the debt due from him in discharge of the surety. 2 Story Eq., 144.

Martin, in this case, does not seek to be substituted to the rights of Marvin, upon the plea of having paid the money, but asks that the land be held primarily liable. But suppose he had paid the money, could he, upon the principal of subrogation, have any greater rights than the creditor, Marvin, himself? If Marvin had retained the title in himself, questions involving the specific execution of agreements, and others might have arisen; but these are not now before the court.

There were several cases cited by counsel for the appellees, which they contended would authorize a sale of the land to save the surety, Martin, harmless. They were cases where either the *money was paid* by the surety, or where the *title was retained by the vendor,* and turned virtually upon the principle of substitution and subrogation.—We have given them a careful perusal, and do not regard them as at all analogous to the case at bar.

With these views, we are of opinion that the decree of the court below was erroneous, and should be set aside. It is, therefore, ordered, adjudged and decreed, that the decree rendered in the court below be set aside, vacated and annulled.

Justice LANCASTER dissented.

Holton vs. the State.—Points decided.

THOMAS J. HOLTEN, PLAINTIFF IN ERROR, *v.* THE STATE.

The affidavit made before a justice of the peace, charging the commission of a criminal offence, the writ issued by the justice, and the *mittimus* directed to the sheriff, form no part of the record in a criminal case, and ought not to be inserted in it.

A copy of the charge of the court to the jury, admitting it to be a full and true copy, cannot rightfully be sent to the jury in a criminal case after their retirement. The charge of the court is part and parcel of the trial of the cause, the whole of which the constitution requires to be public.

The sending the charge of the judge to the jury after their retirement, is tantamount to re-charging the jury at their room, in the absence of the prisoner and his counsel—and to which, if done in their presence, they would have had the right of excepting, or of moving additional instructions, and excepting to a refusal to grant them.

If a charge is such a case can be sent at all, it should be the original, and not a copy.

During the whole of the trial of a capital case, the prisoner has a right to be, and must be, present. This is a settled and well-established principle of criminal law; and this principle is violated by sending the charge of the court to the jury, if such a step is taken in the absence of the prisoner.

The prisoner in a capital case must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions both of law and fact—and if, in any stage of the trial, any proceeding is had by which he has been deprived of such right, it is the denial of a right which the constitution guarantees to him. At very stage of the proceedings, he must have an opportunity of coming into court, and being heard. If any other course is pursued and he is convicted, it cannot be said to be "by due course of law."

Even in a civil case, no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them and they have been charged by the court, unless in open court, in presence, if practicable, of the counsel in the cause. This principle applies with greater force in a criminal and especially in a capital case.

An indictment ought to be certain to every intent—but the abbrevation or character & for "and" is not such an obscurity or ambiguity as will render the indictment bad.

The right of the court to order the record to be amended after verdict and judgment, so as to show the words "a true bill," which words were not entered by the clerk, when the Grand Jury presented the bill of indictment, is not clear, and may well be doubted.

Holton vs. the State.—Statement of Case.

A court at which an indictment is found, must be held at the time prescribed by law and by the proper judge; and the record must show that a Grand Jury was impanneled and sworn, and it must set forth their names, and the time and place, when and where the indictment was found—and if at an adjourned term, when the original term commenced.

Where the record shows that the Grand Jury presented a bill of indictment—The State v. A. B. Felony, "a true bill"—it cannot be held to be the finding of a true bill for murder. And the fact that an indictment for murder is spread out in *extenso* on the record, does not cure the defect—for the record also shows that the grand jury did not find a true bill for murder, *but only for felony.*

Manslaughter is a felony, and where a *bill of indictment for murder* is found "a true bill," but endorsed "felony—a true bill"—*non constat*, but that the Grand Jury could not agree upon a finding for murder, and so found for felony, which might mean manslaughter, or any other felony.

If, in a capital case, the prisoner must be present at every stage of the trial, for the purpose of discussing questions both of *law* and fact, *quaere*, must he not also be present in the Supreme Court, where matters of law touching his case, are brought up to be discussed, settled and adjudicated?

At a Circuit Court, held in and for the county of Jefferson, Middle Circuit of Florida, on the 29th day of November, 1848, the Grand Jury came into court, and presented the following bill of indictment, viz:

"The jurors of the State of Florida, in and for the body of the county of Jefferson, upon their oath present—That Thomas J. Holton, late of the county of Jefferson aforesaid, in the circuit and State aforesaid, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of August, in the year of our Lord one thousand eight hundred and forty-eight, with force of arms, in the county aforesaid, in and upon one John F. Stafford, in the peace of God and said State of Florida then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Thomas J. Holton, with a certain wooden stick of no value, which he, the said Thomas J. Holton, then and there in both his hands had and held, the said John F. Stafford, in and upon the head of him, the said John F. Stafford, then and there feloniously, wilfully and of his malice aforethought did strike, and beat, and wound, giving to the said John F. Stafford, then and there with the wooden stick aforesaid, in and upon the head of him, the said John F. Stafford, one mortal wound of the length or three inches, and of the depth of one inch, of which

said mortal wound the said John F. Stafford, from the said first day of August, in the year aforesaid, until the fifth day of the same month of August, in the year aforesaid, at the county aforesaid, did languish, and languishing did live—on which said fifth day of August, in the year aforesaid, the said John F. Stafford, at the county aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Thomas J. Holton the said John F. Stafford, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the State of Florida."

This indictment was endorsed, "State of Florida *v.* Thomas J. Holton. Indictment for a felony. Found Nov. Term, 1848. A true bill. Allen R. McCall, Foreman."

On the first day of December, at the same term of the court, the said Thomas J. Holton was led to the bar, arraigned and pleaded not guilty to the foregoing indictment. And thereupon came a jury, who having heard the evidence and arguments of counsel, retired to consider of their verdict. And on the second day of December the jury elected, tried and sworn in this cause same into court, and rendered the following verdict: "That the said Thomas J. Holton is guilty of murder, in manner and form as in the indictment against him is alleged," and concluded by recommending the prisoner to mercy.

Whereupon the prisoner, by his counsel, moved the court in arrest of judgment and for a new trial, on the grounds hereinafter stated—which two motions were, by agreement, argued and considered together.

The bill of exceptions shows, that after the argument of counsel and before the jury retired, the counsel for the prisoner moved the court to charge the jury as follows: "But if the jury believe, from the evidence, that the prisoner did not think the blow was likely to produce death, then that the jury should acquit the prisoner"—which was refused by the court, and to that refusal the prisoner, by his counsel, excepted.

The court gave the following charge: "If the jury believe that the deceased came to his death by a blow from defendant, stricken with a stick upon the head, and that such blow was likely to produce death, and that this blow was given not in self defence, nor in the

belief that defendant was in imminent danger of bodily harm, and without adequate provocation, the defendant is guilty of murder. If you shall be of opinion, that some new injury or violence, subsequent to the blow stricken by defendant, was made by another, so as to enlarge the wound or create a new one, and that this caused, of itself, the death, then you will find the defendant not guilty." Defendant's counsel moved to add the words, "or accident," to this last charge, which was done.

It also appears from the record, that after the jury had retired, the judge gave instructions to the sheriff, that if the jury did not agree in one hour to adjourn the court until the next morning. Between 11 and 12 o'clock at night the jury sent to the judge by a bailiff for his charge. The clerk was directed to make out a copy—which was done, and the foregoing charge, not sealed or certified, with the exception of the words "or accident," was sent to them, without the consent of the prisoner or his counsel.

Upon the argument of the motion for a new trial and in arrest of judgment, this proceeding was shown for cause.

The counsel for the prisoner also showed in the second place—That the indictment contained abbreviations for the word "and" in divers places, against the form of the statute in such case made and provided. And a third cause shown was, that it did not appear by the record that "a true bill" had been found, the only entry on the record touching said case and the action of the Grand Jury, being the following: "The Grand Jury came into court and presented the following bill of indictment, to wit: "State of Florida v. Thomas J. Holton, felony." But the court overruled the said motions, both for a new trial and in arrest of judgment, and proceeded to pass sentence upon the prisoner.

The record also shows, that after the motion for a new trial and in arrest of judgment was overruled, the defendant by his counsel prayed the court to sign and seal his bill of exceptions, which was done. And it was thereupon further ordered, that the writ of error asked for in this cause, when issued, shall operate as a *supersedeas;* and there being an omission to state that the Grand Jury presented the indictment in this case "a true bill," it was further ordered that the same be done *nunc pro tunc.*

The judge who tried this cause filed, in compliance with the statute, the following reasons for overruling the motion made in behalf of the prisoner, viz:

The principal ground is the sending to the jury the charge of the Court, in the absence of defendant's counsel. In this I see no cause of objection. It is not pretended that any addition was made to the charge, as pronounced by the court in the presence of the prisoner, his counsel and the jury. The charge was matter of record under the statute and might have been delivered by the judge with the other papers to the jury on their retirement. But complaint is made of the omission of the clerk to add the word *accident* to the second instruction. I cannot perceive that this alters its character, and it is more correct, in point of law, without it. If, indeed, I were satisfied that this omission had injured or caused a prejudice to the prisoner, I would, without hesitancy, grant the new trial; but on further consideration, I am satisfied that there was no evidence in the case making it necessary or proper, or entitling the prisoner to the benefit of it. There is not a word from any witness as to any further injury after the blow by the prisoner, either from any other person, or by accident. The witness who went home with the deceased says he took his head in his lap, and was not even questioned as to further injury, and no other witness was introduced to prove such injury.—The main reliance of the counsel of the defendant was upon such a defence, and in deference to their position, and in favor of life, thinking, by possibility, I might be mistaken, this charge was given. If a new trial were had, I would not, on the testimony in the case, feel justified to give the charge to another jury. I, therefore, do not see the propriety of ranting the trial because of this omission. I consider the verdict, too, of the jury as negativing the defence.

The charge of murder I consider as sufficient, without regarding the abbreviations.

Nor do I regard the objection available, as to the omission of the clerk to enter the bill returned as a true bill. By statute, the foreman is directed to endorse the bill "a true bill," which has been done in this case. This is the true evidence of its having been so found. If there is an omission by the clerk to notice it on the record, the court, on discovering that fact, will have the record amended so as to state the truth, just as the entry, "a true bill," on which a party had been arraigned, when in fact there was not a true bill, would be corrected, to acquit him. Seeing no reason, from an attentive consideration of the facts of the case, to doubt the correctness of the finding of the jury, and not perceiving any in the objec-

tions raised, the motion for a new trial and in arrest of judgment is overruled.

The following are the errors assigned in this case, by the counsel for the plaintiff in error:

1. It was fatal errors to the proceedings to send the instructions of the court to the jury—especially to send a copy, and that not a full and perfect copy.

2. The indictment is bad, because it contains abbreviations and contractions in various parts, such as & for "*and.*"

3. It did not appear of record, that the Grand Jury had ever found a true bill; and though the court ordered the record to be altered, it could not be done.

4. The court erred in refusing the instruction asked as an amendment to those granted.

Brockenbrough for plaintiff in error:

The caption of the indictment states that it was found at "November Term, 1848," whereas no such Term is known to our law—but the "Fall Term," which occurs in October; and, if it were an adjourned Term, that should have been shown. But this and other minor objections are passed to consider the three following, assigned as errors:

1. That it did not appear by the record when judgment was given that any "true bill" had been found.

2. That the indictment contained abbreviations and contractions, such as "&" for "and," contrary to the statute—and, rejecting these abbreviations, the indictment would be vague, insensible, repugnant and without the necessary averments to constitute a good indictment for murder.

3. That after the jury retired a paper was sent to them without consent of prisoner or his counsel, during a recess of the court, which purported to be the instructions of the court, but which were not either the original instructions as given, or a certified copy, or a true copy, but left out an essential and important word, which might affect the whole case, and which was added by the court, at the instance of prisoner's counsel.

I.—Under first head, when motion was made in arrest and judgment was given, the only entry *v.* Holton was this: "The Grand Jury presented the following: The State *v.* Thomas J. Holton, felony."

Our constitution declares, "That no person shall be put to answer any criminal charge, but by presentment, *indictment,* or impeachment." Thomp. Dig., 3.

Our statutes prescribes, "That all indictments shall be signed by the prosecuting attorney, and endorsed on the back by the foreman of the Grand Jury, when so found, *'a true bill,'* and when not found, 'not a true bill,' and signed by him." Thomp. Dig., 522.

This much is necessary to make the paper formal, of lawful form. But it is still *in fieri,* it is not yet a lawful accusation. A deed is formal, when signed and sealed in the presence of two witnesses—but is yet not *a deed till delivered,* and in some instances and respects *till recorded.* And a will is formal, with three witnesses by our law, who sign in presence of testator—but it is still no will, till he is dead—and must be admitted to probate, to complete it as evidence.

So, all prescribed above may be done, and yet a party never be indicted, because the jury may change their minds at any time, till the indictment *is delivered by the foreman to the clerk in open court, in presence of the Grand Jury.* It is that delivering which makes *the accusation*—that is the *presentment.*.

No one can dispute these propositions: 1. No man can be legally convicted till he is legally accused. 2. He can be legally accused of murder only by indictment. 3. He cannot be indicted, except by a decision of twelve Grand Jurors against him. 4. That decision can only be known to the court, and the prisoner, and the world, by the RECORD, showing their assent to that fact in open court, when called expressly for that purpose.

If there is any other mode of showing the assent of twelve, it is not to be found in the books. The invariable practice has been to call them, and to record their presentment—"a true bill," or "not a true bill,"—no other evidence can be shown to have ever been resorted to, but that record, in any case. In making up the rolls in England, where the case has been removed for trial in any of the various modes there practiced, if there has been any error or omission is transcribing, it is to this original record of fact, which no where else exists, to which they resort to amend all the rest. There is no case in which they have altered this, or amended, or added to it. When the Grand Jury have given their bill and been discharged, the record then made must forever stand, because there is nothing extant *to amend or alter by.* The body which established the fact,

has vanished forever. It can no more be altered by a court, than a constitution or law, after the adjournment of a Legislature, can be altered by the Executive—or a judgment of a court altered by a Grand Jury. *It is the judgment of the Grand Jury*—a co-ordinate branch of the court—to be entered by the clerk, in presence of the judge. It is a thing which the judge cannot control, except to see that it is properly recorded at the time, in presence of the Grand Jury. He *cannot*, even in presence of the Grand Jury, alter their decision, or add to it, or require them to alter, or add to it. He is obliged to ask their consent, if they are content that the court may alter matters of form, not altering matters of substance; and *if they consent*. he may then alter matters of form *in their presence*, but not after they have retired. All this ceremony must be very idle, if he can afterwards *enter a verdict, where he finds none*. The record is said to be in the breast of the judge until the end of the term, and until that time, he may alter, and amend, and change—but what?—Surely only *his own decensions and opinions*, and the accidental misprisons of his clerk. The record of other people's decisions, opinions and verdicts, are not in the breast of the judge—they never are there. The verdicts are in the breast of the juries, till they are *recorded*, and they are upon the record, *and no where else*. The record of a verdict is as conclusive and irrevocable to the jury, as the end of the term to the judge. It is more so. There are some matters he may amend or alter afterwards, the jury never can. If the jury who give the decision cannot alter or amend the record then made of it, how can the judge, in whose breast it never was, and consequently who can never know, except by the record, what they intended?

The verdicts are acts independent of the court. They constitute a *basis*, on which the court is then to begin to act. It is the absence of this of which we complain. We oppose a judgment, because the *basis* is wanting—and the judgment is given, and then the *basis* created by an *amendment*.

Until the bill is brought in "a true bill" by twelve grand jurors there is no accusation—nothing on which the court can arraign—to which the prisoner can plead—no fact alleged to which a petit jury can say "guilty—for which the court adjudge death." Until it appears on the record, no one knows that it is brought in. *De non. apparentibus et non existentibus est eadem lex.*

In this case, the Grand Jury have returned into court only one

bill—"The State *v.* Holton, felony." Must we presume it "murder," in preference to any other "felony"—must we presume it "a true bill," in preference to 'not a true bill'—or must we rely upon the frail memory of man after judgment of death, by which to amend the record.

Record evidence is necessary, else why amend the record? And yet a record from memory is no record. The amendment condemns itself. The bandage shows the wound, but cannot heal it. As the record shows on its face nothing of the finding a true bill, the presumption of innocence arises, that none was found. This presumption outweighs all human memory—nothing but a record can strangle it.

The signature of the foreman on the back of the indictment is only a form, making the "bill"an "indictment." It does not prove the concurrence of twelve, *or the return to court,* any more than does the Solicitor's signature to the body of the indictment. It proves only for *one*—we claim proof for twelve. To give this, it must be *presented in open court,* with the assent of twelve. No court would receive a bill and record it as a true bill, if only eleven grand jurors answered when called. Formerly the names of those who presented a bill had to be set out at length. The foreman may sign by mistake (as has been done) one bill for another—in anticipation, or after a hasty agreement, afterwards reversed by the jury, and he forget to erase, or to add the word "not"—by mistake of law, ((in which a majority of the jury may partake,) as by deeming a majority of the Grand Jury (though less than twelve) enough to find a bill, as in Low's case. 4 Greenleaf, 439.

But if the signature was evidence of the concurrence of twelve, which is impossible, it still would not show the further fact, that the *locus penitentiae* had passed, that the act was consummated, that the bill was *presented* in open court. It may have come in by accident, or mistake, or fraud.

The signature of the foreman *is no evidence at all of anything, until the bill is presented in court.* It is the presentment in court, that makes the signature of the foreman of any importance, and then only as the *completion of a form.* It is *the record* which only makes the *signature* evidence of a perfect indictment—then *it* cannot make a record. Until the record shows the fact, that the bill has been returned "a true bill," the court does not judicially know of this sig-

nature of the foreman, or in fact that there is an indictment. And if it was handed to him during the term, and he could find no record, he could not notice it. He could not ask the clerk or the bystanders, if such a bill had been brought in. He could not rely upon their memories, though they might be unanimous—not because it would not be true, but because he would not have a record. How, then, can he rely upon his own memory? And if he puts his own memory upon the record, it can be no better than that of all the rest—it cannot supply the place of that which was *indispensable*.

We thus see that the record is the *substance*, (showing that twelve agree and present before the world a solemn fact, affecting often life, and liberty, and always reputation,) and the signature of the foreman is only the *form* to complete the instrument of accusation; and suppose the form was defective, and there was no signature on the back, though written a true bill and recorded a true bill, we could not amend even the *form* by the substance, which showed twelve had concurred and had presented in open court—how much worse is it, then, to amend the substance by the form? In the former case, too, the record would be conclusive, that the bill was found and presented by twelve; but in the latter case, the signature proves nothing but the completion of the form.

[Here Judge Lancaster asked if the indictment is properly endorsed—and if so, *when* it was so endorsed? Brockenbrough—"It is properly endorsed. But *when* does not appear, because we have not the record of its return into open court, and the impossibility of answering by the record when a man was indicted, sustains our argument. It proves the endorsement to be nothing, until the finding is recorded. An indictment need not show *when* it was found, because the record shows *when* it was found. So decided, 2 Virginia cases, p. 3.]

To support these views, see what is inserted in making up the record. 1 Chitty's Crim. L., 719.

See the ceremonies pursued in bringing in a bill. 1 Chitty, 324. The same are found in 3 Robinson's Practice, as pursued in Virginia. The same has been the Florida practice. No book lays down any different practice any where. These ceremonies, when considered as essential, and the record conclusive, become vitally important to life, liberty and reputation, and carry out in practice the protection afforded by our Constitution and Bills of Right; but become a mere

senseless mummery, if they may be dispensed with entirely, or the results equally recorded without the presence of the Grand Jury.

On removing the cause, or copying the record, these ceremonies become an important part of the *caption*, without which the record is not admissible in evidence. 1 Chitty, 326. They are important, because they prove the *fact*, and show that there is such a record; and although the caption may be amended, it is because it is a copy, and the record we require must exist to amend it by. In 1 Chitty, 326, is the form of a caption, concluding *"it is presented,"* and formerly it was indispensable that this should be in the present tense, but now it is not thought to be absolutely necessary. This could not have been important, except to show that the *record* was made at the time it was presented, and if it even *seemed* to have been made afterwards, it was error.

But it is said this record can be amended, and has been amended. 2 Hawkins Pl. C., 336—'7, sec. 96, 97. This admits the conclusiveness of the prior argument, and that it is indispensable to *the judgment*. This admission invalidates the judgment, unless the capacity to amend it is established. Of this, the burden is upon the State.

What is an amendment? t must be an improvement, by change or addition of that which *exists*, but is imperfect. You cannot amend a non-entity.

We say there is no true bill presented. We examine the record, and show there is none. Can you call it amendment, to insert a true bill was presented?

You order it *nunc pro tunc*—that is, you order it *now* for *then*, because it should have been done *then*. But it is too late to do it *now*, because it is after judgment. And before judgment, you must have had a record of a true bill, or you could give no valid judgment.—But you had no record—we moved in arrest, *because* there was no record—for that we moved in arrest.

You had no record of a legal accusation—you give judgment, and then make the record *now* for then. We say your judgment stands *void* by your own amendment, because it shows you have only *now*, which was indispensable *then*.

Besides, it is a thing you cannot make *now*. There was but one branch of the court which could make it at any time, and that has dispersed. You do now what *ought* to have been done then. But it is

precisely the evidence of that fact which is wanting—*ought* it to have been done then? We know not, unless we had the record to prove there were twelve present assenting. We can listen to no man's memory. The only evidence we can have that it ought to have been done, is the *record* that it was done. Wherever you can amend, you must have something to *amend by*. Here there is nothing—there was nothing—there never will be any thing. It was a fact which appears no where else, in no other manner—of which no other evidence exists, or was ever meant to exist, anywhere but the record made then. A *fact* which only existed at that moment. Before that time it was inchoate, afterwards irrevocable and unalterable. It was no one's duty to note it any where else, or preserve it, or keep a record, minute, or memorandum of it. If any one did so, it was unofficial—no record—merely memory, parol.

See 1 Chitty, 721-'2. "And no court can make any alteration, when once the judgment is solemnly entered upon the record." And strange would judgment records read, if, after sentence of death is solemnly passed, and the prisoner is remanded to the place whence he came, to depart thence only to the grave—after the prisoner is gone, if then only verdicts were to be enterd for the first time upon the record. By whatever name we call it, the record still shows judgment of death without a true bill—and the insertion of a true bill afterwards, when the prisoner was gone, the Grand Jury dispersed.

It even appears that the acts of the court must be described in the *present*, not the past tense—that the record must show that the prisoner was present, *when sentence of death was passed*. 1 Chitty, 751. And this because the statutes of amendments do not apply to criminal proceedings. This matter of the *present tense*, though frivolous it may seem, shows that the record must walk *pari passu* with the actual proceedings, and must tell of things done as they are done at the time, and not by any subsequent alterations and amendments—and if these niceties are important, what shall we say of the whole foundation of the action being brought in at the end, or the cellar and its massive walls, intended to sustain, placed on the top of the building?

At page 752, [753,] 1 Chitty, we learn that "no alteration can be made in the finding of the jury of matters of substance, whether it be the decision of the grand or the petit inquest."

"The judge may amend his own judgment, &c."—"mere ministerial acts may be amended at any time"—"any matter not of record may be amended by *the record*," &c.

So 1 Chitty, 644, [645,] "But it seems to be the better opinion, that though a verdict cannot be amended in matter *of fact*, yet the court may amend a mere error in form even in capital cases, when there are any minutes *or notes by which it can be amended.*" This must mean whilst the jury is present, even as to form. But surely it is a matter of *fact*—"a true bill," or "not a true bill." It is not only matter of *fact*, but it is all—it is the whole verdict—it is all the jury has to say. All the rest is only the recital of the clerk of what occurs in the court—not of any conclusion to which the jury come, or any thing which occurred in the jury room. The clerk says, "This day the Grand Jury came into court, and presented the following bills: State *v.* C. D., larceny, State *v.* Holton, murder."

This tells nothing of what the jury think; it merely shows they came with certain papers. If he says no more, the presumption of innocence is, that they ignored both. If he says "A true bill," then the jury speaks, and it is all *they* say. If "not a true bill," it is equally all they say. To insert either of these is to make the whole without a memorandum. If we must insert either in their absence, we must insert by legal presumption—"not a true bill."

But in this case the *amendment*, if made and *good* in all other respects, does not go far enough. It makes it *"felony, a true bill"*—but not "MURDER, a true bill," which is what is wanted and indispensable. The bill found might have been the highest felony. The amendment may be perfectly correct, and still *non constat* that a bill for *murder* was ever found by that Grand Jury. And this shows the danger of amendments. If the court could amend by adding the verdict, could it not also amend by altering the description? Might it not have erased felony, and inserted murder, from memory? And if so suppose two bills—the one felony, for stealing, a true bill—the other felony, for murder, *not* a true bill—might not the court alter and transpose these, by the same power of amendment? Where is the limit? Suppose the Judge's memory was one way, and every other person's the other, which shall prevail? But if amendment is legal, can it be made when the prisoner is in the *condemned cell?*—has he not a right to be heard by counsel, to introduce *evidence* upon the *new fact* to be introduced upon the record?—has he no right to ex-

cept to the opinion of the court? Can he not claim to have the fact tried regularly?—can the court alter of its own mere motion, when the solicitor does not ask it for the State—when he says in *open court* it is *sufficient as it is,* and the court *concurs* in this, and passes judgment, can it afterwards in private order the change?

II.—As to abreviations in the indictment. The statute is peremptory—it shall not be in Latin, it shall be in English, and there shall not be abreviations. It will not, therefore, answer to say, "&" is a short way of writing the latin *"et,"* because all abbreviations are a short way of writing something else. And if it is Latin, it violates the other part of the statute, which requires it to be in English. See both these rules in 1 Chit. Cr. Law, 174, 175, 176.

It is no answer to say the indictment may be read without them.—Because being in violation of the statute, it is void, and cannot be read at all. But this indictment, without the "ands" written "&," would be insensible in many places, and is not sufficient in some vital parts.

Thus it not only reads, "in the Circuit State aforesaid, "in upon his head" "did strike, beat," and the like, but says he did it with a stick which he "then there *had held*"—that this, before that time, whereas he must have held it *at* the time. Besides it does not say, if we leave out the "&," that he killed Stafford or that he murdered him, but that he "did *kill murder,*" which is either nonsense, or an averment that he killed a man named "murder," and certainly no averment that he killed or murdered Stafford.

III.—As to the instruction sent the jury. This requires no argument; neither the court, nor the parties, nor any other person can send a thing to the jury, nor hold any communication except in open court. No one can speak to them out of court except the bailiff, and he only to ask them if they have agreed. Our law makes the instructions a record—they are required to be written. A copy of it is not evidence for any purpose, except made out in the regular way—a mutilated copy cannot be. The statute which requires them to be written does not authorize them to be sent to the jury, though they might be, *perhaps,* with the prisoner's consent, in open court. But to send a loose, *imperfect copy* out of court, by an order which does not appear of record, must be inadmissible. And who can tell what effect they had? It is presumed they were thought of some importance, or the law would not record them, the judge would not give them, and the jury must have thought them of some importance, or

they would not have sent for them. After receiving them and pondering upon them, they agreed upon a verdict, which they did not agree upon before, though they had heard the same short charges, impressively and deliberately read to them more than once—who shall them say it had no effect? When that charge was delivered in court, prisoner's counsel asked the addition of a word—a word which introduced a whole chapter of possible accidents to the consideration of the mind. The prisoner and his counsel must have thought it important; the court must have thought it of some import, as at least giving a chance of life—or to say the least, that is was not unreasonable or unlawful to give it. The jury wanted the charge, it was said—no doubt truly—but the application should have been made in open court, and recorded when granted, if granted—for the bailiff may have been mistaken. But if they did want the charge, they wanted it as given—the court must have ordered it as given. It was sent without one of its words—who shall say that the jury did not doubt about that very word?—and that the paper sent them without it, may not have solved the doubts?—or if it was some thing else, who knows what chain of thought that word might have awakened in the minds of the jury? The court states that the branch of the subject was much relied upon by counsel—a branch which made impression enough on their minds to enforce with zeal, might by that *word* have raised at least a *doubt* in a jury's mind, when he was there *pondering* over the charge written in fixed unvarying form before him—when the evidence was sinking into a dream, and the argument only a confused and cloudy reminiscence.

Hogue, for the State?

The first error assigned in this case is, that it was not proper to send the written charge of the court to the jury. The law requires that the charge shall be reduced to writing *and filed in the case.*—If the charge sent to the jury contains nothing more that the written charge filed in the case, it would seem that it is not such error, because there is nothing in such a proceeding which "gives reason to suspect the purity of the verdict," and nothing which "affects the impartiality of the trial." Any irregularity committed in the course of a criminal proceeding must be, in order to vitiate the verdict, of such a character as to have the effect of destroying the purity of the verdict and the impartiality of the trial, or at least of affording ground to

spect one or the other. Davis Crim. Law, 467. See also 12 ck., page 519. Though the act complained of is unusual or "con- ıry to the ordinary forms," it is not necessarily such an irregularity to affect the impartiality of the jury. 12 Pick., 519, 510. See on e subject of instructions, 7 Wheeler Am. Com. Law, 122.

But it is objected, in this case, that the copy sent was not a true py—that the words "or accident" were left out. These words were t material and in fact, were not necessary in the original. The ɔord shows that there was no evidence which would have required e Judge to insert the omitted words in the charge which he gave the jury before their retirement. Unless it can be supposed that e omission of these words brought the jury to a different conclusion ɔm what they would have arrived at, had those words been in the py, it cannot be error. The impartiality of the trial would not be ected by the omission. If the omission would not have such an ect or tendency, then the verdict will be supported upon the prin- ɔles before laid down, as to irregularities.

The second error assigned is—that the indictment contains abbre- ıtions. The only abbreviation complained of is that & is written r *and*. It would seem, upon principle and reason, that such an jjection as this would not be sufficient to vitiate a verdict, upon ɔtion for a new trial or in arrest of judgment. At most, it is a mere rmal objection, which ought to have been taken advantage of before ɜading.

"An indictment," as defined by Lord Hale, "is nothing else but a ain, brief and certain narrative," &c., "in which, in favor of human e, great strictness has at all times been required, to that degree, as become the disease and reproach of the law." 2 Hal. Hist. P. C. 3. 3 Bac. Abridg., Indictment, letter G. "There is no rule that ıer words should be employed than such as are in ordinary use, or at a different sense should be put upon them than what they bear ordinary acceptation."—Ibidem. Tried by this rule, it cannot be etended that the abbreviation & can be used in any other sense than *d*. It is in such use as to be a full word of itself, and can scarcely regarded as an abbreviation. It is as much and as often written the other, and no meaning can be attached to it repugnant to the ıse or context of the indictment. If, then, it is free from ambigu- ', on what ground can it be objected to on motion for a new trial or arrest." No case, it is believed, can be found, in which such an

objection was sustained. If the sense be clear, nice objections ought not to be regarded. 2 East., 259. The statute against abbreviations was only intended to prevent such as rendered the indictment obscure or ambiguous. *This* cannot be argued of the abbreviation complained of here.

The third error assigned is—that it does not appear by the record that the Grand Jury had ever found a true bill.

The indictment itself has the indorsement "a true bill," but this fact was not instantly recorded by the clerk. This is the objection. The formalities and solemnities required, so far as the books show, are simply these: the Grand Jury come into court and publicly present the indictment. If it is returned a true bill, it is so indorsed and signed by the foreman. "The indictment is then said to be *found*, and the party *stands indicted.*" 4 Black. Com., 306. 4 Com. Dig. 645.

Now the Grand Jury Jury is the accusing body. Does the court try the party upon their accusation, thus formally and solemnly presented, or upon the record made of the fact by the clerk? Clearly upon the accusation of the Grand Jury. The only case in which I have seen it required that there should be a record of the fact, is the case of Cawood, 2 Va. Ca. And yet the judge who pronounced the opinion in that case, mentions no other forms or solemnities requisite to the complete accusation of the party, than those above laid down. It is true, he says the Grand Jury deliver the indictment to the leerk, "*who records the fact.*"

In the case of Cawood the record did not show that the Grand Jury had ever presented any indictment whatever against him. In this respect, it differs from the case before this court. The record here shows that the accusing body came into court and presented an indictment against Holton for felony; but the record did not show the words "a true bill," though that indorsement was on the indictment itself. In other words, the clerk failed only to record the words "a true bill."

Now, if that formality was necessary, though I can find it no where so laid down, except in Cawood's case, the next question is—could the court direct the clerk to place those words on his record book, in addition to the entry he had already made in the case? It seems to me it is, at most, an omission of the clerk which can be rectified at any time. The record of the fact of the finding "a true bill" is not

one of those solemnities deemed necessary to constitute a complete accusation by the accusing body.

This question involves the whole doctrine of the power of courts over their records, during the term. This doctrine is briefly set forth in 3d Vol. Dane's Abridg., 510, to which I refer the court. I remark that, in the case before the court, it *does* appear by the record that the Jury had presented a bill in open court against the prisoner. All that the court did was to make that record say "a true bill." In Cawood's case, nothing whatever appeared on the record, yet I apprehend that in that case the court below might have ordered it to appear, so as to make the record conform to the indictment; and such appears to have been the opinion of the General Court of Virginia, in that case.

But another question still remains. The prisoner was tried for murder; both the indorsement and the record read "Felony—a true bill;" is this sufficient?

"The common law of England in relation to crimes and misdemeanors, except so far as the same relates to the modes and degrees of punishment, shall be, and the same is hereby, adopted and declared to be in full force in this State." Thomp. Digest, 489.

"Any person convicted of the crime of murder shall be punished with death." Same, 490.

"Felony comprises every species of crime which occasioned, at common law, the forfeiture of lands and goods." This most frequently happens in those crimes which are punished with death."—4 Black. Com., 94.

In this country there is no such consequence as forfeiture of property. The only attribute remaining to distinguish a statutory felony from any other offence is the punishment of death—though it is competent to the Legislature to make any offence a felony without annexing such punishment; but if that punishment is annexed, it is necessarily a felony.

"All statutory crimes to which capital punishment is annexed are, by reason of such punishment, felonies." 3d Robinson's Prac., 39, Now the common law declares that murder is a crime. The statute of this State also declares it. It is, therefore, a statutory offence.—The statute annexes the punishment of death. It is, therefore, a felony. If it be a felony, the indorsement of an indictment for murder with the words *"a felony"* would not vitiate the indictment.

In this case the prisoner was indicted for murder which, by the indorsement on the indictment and by the record, was styled "a felony." The body of the indictment shows for what particular crime the party was indicted. He was led to the bar and arraigned for murder, and pleaded not guilty. The only record, then, to which it is at all necessary to look, shows that the prisoner, Holton, was indicted and tried for the crime of murder; and certainly, the mere indorsement of the words "felony," which is no part of the accusation, should not vitiate the indictment and the verdict of the jury.

On the contrary, upon the reason and principle, the very reverse is to my mind perfectly clear. The indorsement of the particular kind of offence or grade of crime is made by the prosecuting attorney. The Grand Jury has nothing to do with it. All that they endorse is "a true bill," signed by the foreman. The foreman does not sign the particular offence, but affixes his signature only to the words "a true bill" or "not found," as the case may be. Suppose no crime was indorsed at all, and the Grand Jury found "a true bill," would it not be sufficient? Would not the Grand Jury, in such a case, have complied with every form and every solemnity required, in the language of the authorities, to make "the accusation complete?"

But it is perfectly clear to my mind that the word "felony," embracing as it does the crime for which Holton was indicted, was a good indorsement, if, indeed, any indorsement of crime was requisite. It is a generic term, and the body of the indictment points out, declares and makes known, as the action of the Grand Jury, the species of crime of which they accuse the party in any particular case.

The action of a Grand Jury, in finding a bill of indictment and indorsing it "a felony," if, indeed, they do indorse it, merely assigns the particular crime charged to the general class to which it belongs. If this is error in law, then the Grand Jury have erred in this case, supposing they made the indorsement in question, although they have not erred in logic.

The counsel for the plaintiff in error lays down four propositions which, he says, no one will dispute: 1. That no man can be legally convicted until he is legally accused. 2. He can be legally accused of murder only by indictment. 3. He can be indicted only by a decision of twelve against him. 4. That decision can only be known by the record.

It is not necessary, nor will it be attempted, to deny these propo-

sitions. The record in this case shows that the prisoner was legally accused. How is the decision of twelve of the Grand Jury against a party to be made known, but by the forms prescribed by law?—The indorsement of the indictment "a true bill," signed by the foreman, is the only evidence which the law requires of the assent of twelve. "The signature of the foreman of the Grand Jury to an indictment, certifying it to be a true bill, legally imports that it was found by twelve or more grand jurors." Such was the sensible decision of the Supreme Court of Massachusetts in the case of Turns *v.* Commonwealth, 6 Metcalf, 225.

But it is said there is no record of this fact. I answer that there is. The record shows that it was amended. This, the counsel contends, is an acknowledgement of the error. Suppose it is; the court has power to correct any error during the term. This power is clearly settled, and cannot be denied.

But it is said the amendment cannot be made after the discharge of the accusing body. Their assent to the amendment, it is said, is absolutely necessary. Strange doctrine, this? When the Grand Jury have come into court and presented a bill of indictment "a true bill," and have been discharged, the indictment so found no longer belongs to them. It is placed, when found, among the files of the court, and from the court's own files the amendment is made and not from any papers in possession of the Grand Jury, or from the recollection of the members of the Grand Jury, or the memory of other persons.

Every form of law—every requisite in a criminal proceeding has been complied with in this case. There has been no irregularity affecting the impartiality of the trial. Not a step has been taken that does not clearly show the correctness of the proceedings, the fairness of the trial and the justice of the verdict. There is no reason, therefore, why a new trial should be awarded.

Opinion by Chief Justice DOUGLAS:

This case was brought up by writ of error from the Circuit Court of Jefferson county.

The record commences with a caption in the following words, to wit: "Pleas at the Court House in the town of Monticello, Jefferson county, in the State of Florida, on the first day of December,

in the year of our Lord one thousand eight hundred and forty-eight, before the Circuit Court of law of the county aforesaid."

And after setting out an affidavit said to have been made before a justice of the peace, the issuing of a writ by the same justice, and a mittimus to the sheriff of said county, with the following endorsement by the said sheriff, viz: By virtue of the within, I have received and committed to jail the said Thomas J. Holton"—none of which ought to have been inserted in said record, as they form no part of it—the record proceeds as follows:

"And on another day, to wit: on the twenty-ninth day of November, in the year one thousand eight hundred and forty-eight, and at the October adjourned term of the Circuit Court for Jefferson county, the following entry was made among the records of said court, to wit: "The Grand Jury came into court, and presented the following bill of indictment, to wit: The State of Florida *v.* Thomas J. Holton, felony. A true bill—together with other Criminal cases.

The following is a copy of said bill of indictment, with the endorsement thereon, to wit: "State of Florida. In the Circuit Court for the Middle Circuit of the State of Florida, for Jefferson county, at November term, in the year of our Lord one thousand eight hundred and forty-eight. Jefferson county, *ss.*" Setting out the indictment, which is in the usual form, charging Thomas J. Holton with having murdered one John F. Stafford, with the following endorsement: "State of Florida *v.* Thomas J. Holton. Indictment for a felony.—Found Nov. term, 1848. A true bill, Allen R. McCall, Foreman." On the first day of December, 1848, as appears by the record, the prisoner, Thomas J. Holton, was arraigned, and pleaded not guilty to the said indictment, and the case was submitted to a jury, who, by their verdict, found the prisoner "Guilty of Murder"—upon which verdict, judgment was pronounced, and the prisoner sentenced to execution; which sentence is succeeded by the following entry: "and thereupon the said Thomas J. Holton is remanded to jail;" after which, the following order was made by the court, to wit: "The State of Florida *v.* Thomas J. Holton, murder, a true bill. In this case, after the rendering of the verdict by the jury, the defendant by his counsel moved the court for a new trial and in arrest of judgment, which motion was overruled." Whereupon, the said defendant by his counsel prayed the court to sign and seal his bill of exceptions. "It is, therefore, ordered that the writ of error asked for in

this cause, when issued, shall act as a *supersedeas;* and there being an omission to state that the Grand Jury presented the indictment in this case 'a true bill,' it is, therefore, ordered that the same be done *'nunc pro tunc.'"*

It further appears, by a bill of exceptions, which constitutes a part of the record in this case, that between 11 and 12 o'clock at night, the jury had sent to the judge by their bailiff for his charge, and that the clerk had, on a message from the judge, made out the following paper as a copy of the said charge, to wit: "If the jurors believe that the deceased came to his death by a blow from defendant, stricken with a stick upon the head, and that such blow was given not in self defence, nor in the belief that defendant was in imminent danger of bodily harm, and without adequate provocation, the defendant is guilty of murder." "If the jury shall be of opinion that some new injury or violence, subsequent to the blow stricken by defendant, was made by another, so as to enlarge the wound, or create a new one, and that this caused *of itself* the death, then you will find the defendant not guilty." To the close of this last charge, the words "add accident," were attached in the hand writing of the judge, but were omitted in the copy sent by the clerk to the jury—and said charge, omitting the said word accident, and not sealed or certified, and without consent of prisoner or his counsel, was sent to the jury.

It appears, by another portion of the record, which, by-the-bye, is very irregularly made out, that this word *accident* was, on motion of the prisoner's counsel, added in the last clause of the charge, immediately after the word *"another,"* so as to make it read, *"made by another, or by accident, so as to enlarge,"* &c.

It also appears that the prisoner by his counsel moved the court to add to his first instruction the words—"But if the jury believe, from the evidence, that the prisoner did not believe at the time he inflicted the blow, that it was with a weapon likely to inflict death, then that the jury might acquit the prisoner;" which was refused by the court, and to that refusal, the prisoner by his counsel excepted. The foregoing contains all of the record properly applicable to the question presented in this case.

The important and delicate trust which we are called upon to exercise, in reviewing cases of the description of the one now presented for our consideration, strongly admonishes us of the caution

and prudence with which any such examination ought to be attended. Every step in the conduct of a trial of this nature imposes upon the court very great responsibility, and requires its fullest deliberation. All the light which can be derived from authority, or from argument and discussion, is deserving of the most serious attention.—With these views of the character of the duties evolved upon us in this case, we approach the errors assigned; and the *first* is, that "it was a fatal error to the proceedings to send the instructions of the court to the jury—especially to send a copy, and that *not a full and perfect copy.*"

This assignment is based upon the fact stated in the record, "that between twelve and one o'clock at night, the jury had sent to the judge by their bailiff for his charge, and that the clerk had, on a message from the judge, made out a paper containing the following, which he sent to the jury, viz: "If the jury shall be of opinion that some new injury or violence, subsequent to the blow stricken by the defendant, was made by another, so as to enlarge the wound, or cause a new one, and that this caused of itself the death, then you will find the defendant not guilty."

It further appears, that when this charge was given to the jury, counsel for the prisoner moved the court to add the word *accident*, so as to make the charge read, "made by another, or *by accident*," &c., which was done; and that the judge added the words (by an asterisk) in his own handwriting, at the foot of the written charge; but that the clerk, in the paper that he made and sent to the jury, left these words out.

The first question presented for our consideration, upon this statement of facts, is, whether this paper, admitting it to have been a full and true copy, could rightfully have been sent (as this was sent) to the jury? And after the most mature deliberation, and the most full consideration of the question, we are of opinion that it could not.—The Constitution of this State, chap. 1, sec. 2, No. 10, Thompson's Digest, page 2, amongst other things, provides, "That in all criminal prosecutions, by indictment or presentment, the accused shall have a speedy *public trial*, by an impartial jury of the county or district where the offence was committed;" and No. 15, page 3, "No person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment." The charge of the court to the jury is the evidence to them of the law which they should apply to the

facts, and is part and parcel of the trial of the cause, the whole of which should be *public*. The statute approved January 4, 1848, sec. 8, Pamph. Laws, p. 10, requires, "That charges made by judges to juries in criminal cases shall be reduced to writing, and filed in the case;" and because this is so, it has been urged by the Attorney General, that "If the charge sent to the jury contains nothing more than the written charge filed in the case, it would seem that it is not error, because there is nothing in such a proceeding which gives reason to suspect the purity of the verdict, and nothing which affects the impartiality of the trial;" and Davis' Cr. L., 467, and 12 Pick. Rep., 510, 519, were cited to sustain this proposition. In the case in 12 Pick., the constable who attended the jury furnished them some refreshments, without an order of the court, but they were such as the court deemed reasonable, and without deciding whether the facts disclosd an irregularity or not, it refused to grant a new trial for that cause. Davis says: "The present inclination of the courts appears to be, rather to relax than to increase the strictness of the law on this subject, in so far as the object to be attained, which is the guarding against the exercise of any improper influence over the jury, will allow; and, therefore, where there is nothing in the transaction which gives reason to suspect the purity of the verdict, to sustain it, notwithstanding any *trivial* irregularity, not affecting the impartiality of the trial." In the case of Guykowski *v.* The People, 1 Scamm., 479, also cited by the Attorney General, the court held the following language: "Where there is every reason to believe, from an inspection of the proceedings, that the intrinsic merits of the case have been fairly ascertained and determined, the adjudication of the inferior tribunal should not be disturbed, unless it satisfactorily appear that some settled and well established principle of criminal law, or rule of proceeding, has been clearly violated." While the justice of the rule here asserted is admitted, and an adherence to its principles conceded, it is of equal importance that the rights of the accused should be protected and preserved, and the essential forms of law prescribed for the mode of conducting the ascertainment of his guilt, should be carefully observed and followed. A departure from them could not fail to produce difficulties and doubts. A recognition of a departure in one case, might lead to the adoption of another; and finally, those barriers, which are guarantees for the regular and impartial conducting of criminal cases, might be frittered away, and

possibly eventuate in gross in justice. It is much easier to require the observance of the mandates of the law, than to determine in what cases they may be safely dispensed with. It is, therefore, more proper and more consonant to reason and justice to require a substantial adherence, than to suffer innovations upon the known and positive rules prescribed by law for the regular conducting of causes. The justice of these grounds is as clear and apparent, as those which are founded on principles of humanity, by which the administration of criminal law has been marked, and which declare that the accused stands on all his rights, and waives nothing which is irregular, and more especially so, where life is in the question." Testing this case by these principles, we enquire whether a positive rule, prescribed by the Constitution, which is the paramount law of the State, would not be violated, by thus sending the charge to the jury? It would be nothing less or more than re-charging the jury at their room, in the absence of the prisoner and his counsel, as had been once publicly done in their presence, in open court. We are not prepared to say, what effect this might have upon the jury in determining their verdict; but certain it is, that if the charge, instead of being sent to the jury, had been re-read to them by the judge in open court, in presence of the prisoner and his counsel, they would have had the right (and might have exercised it) of moving for additional instructions, and if their motion was overruled, of excepting to the opinion of the court, or of excepting as to those already given, if they had not done so before; upon which exceptions, the prisoner might have based a writ of error. Of the benefit of all this a prisoner might be, and of all but the last he actually was, deprived in this case, by the course that was adopted. But if a doubt could be entertained upon this point, we think there can be none whatever that if a charge, in such a case and under such circumstances, may be sent by the judge to the jury, it should be the original one, and not a copy.

But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which is, that during the trial of a capital case, (the whole trial,) the prisoner has a right to be, and must be, present—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place

in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence. Suppose that after the testimony has been taken the prisoner escapes, or becomes sick, and is unable to be brought into court, can the jury render a verdict? Suppose he escapes or is taken sick, and is thus disabled, after the verdict has been received, can judgment be rendered? If he were to escape or become sick, and unable to remain in court while the testimony is being taken, or the charge is being given, would the cause proceed?

In the case of the State v. Hughes, 2 Alabama Reps., 103, 104, Collier, Ch. Justice, delivering the opinion of the court, said: "The 10th sec. of the 1st art. of the constitution declares, that "In all criminal prosecutions, the accused has a right to be heard by himself and counsel," &c.; again—"and in all prosecutions, by indictment or information, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed—he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, but by due course of law." The constitutional provision guarantees to the accused the right, not only to discuss questions of law and fact, which may arise preparatory to or pending the trial before the jury, or other proceedings in the cause. That he may avail himself of this privilege, the opportunity must be afforded him of coming into court and being heard, before he is foreclosed of any legal exception. If a different course is pursued, and a sentence pronounced against him, extending to life, liberty or property, he cannot be said to have been "convicted by due course of law." Our constitution, sec. 2, No. 8, is essentially the same in principle, as that of Alabama above cited.

In Sperry's case, 7 Leigh Reps., 623, (2 supp. to the United States Digest, page 154, No. 242,) the record showed that on the 29th of September, 1837, the accused was led to the bar, in custody of the keeper of the jail, and was then arraigned and pleaded, and on motion of the prisoner, the cause was continued until the first day of the next term, and thereupon he was remanded to the jail. Afterwards, at a court held the 27th day of April, 1838, it was entered upon the record, that on that day "came, as well as the attorney for the commonwealth, as the prisoner *by his attorney*, and thereupon

came a jury," &c. The jury, not agreeing upon their verdict on that day, were adjourned over until the next. Nothing being stated on the record, from which it could necessarily be inferred that the prisoner was personally present on the 27th April, the General Court decided that the verdict, which was found on the following day, should be set aside, and a *venire de novo awarded.* In the case of the Commonwealth *v.* Parker, 2 Pickering, 550, which was an indictment for murder, after the jury had been impanelled, and the circumstances of the case stated to them, the counsel for the prisoner moved that the jury should view the place where the assault was alleged to have been made. Parker, Ch. Justice, asked the counsel if they knew of an instance of a view being granted in a case like this, saying that it seemed to violate the principle, but the proceedings should be in the presence of the accused. 3d Robinson's Practice, 178. 1 Chitty's Crim. Law, 636, and 4 Black. Comm., 317, and the State *v.* Battle, 7 Alabama Reps., 259, are also authorities which tend to sustain this view of the matter. In the case last cited the court held, that, when a prisoner will not appear in court to hear the verdict which the jury announce themselves ready to render, the court may order a mistrial. This was a charge of an assault with an intent to kill, and the prisoner had fled when the jury came in—and if the court would not proceed in such a case in the absence of the prisoner, surely it should not in a capital case.

In Sergeant *v.* Roberts, et al., 1 Pick. Reps., 338, cited by the counsel for the prisoner, there was a motion for a new trial, and one of the grounds on which it rested, was a written communication from the judge to the jury, after the court was adjourned, in answer to a note from their foreman, stating the improbability of their agreeing upon a verdict. In regard to this, Parker, Ch. Justice, who delivered the opinion of the court, said: "As it is impossible, we think, to complain of the substance of the communication, the only question is, whether any communication at all is proper; and if it was not, the party against whom the verdict was, is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and where practicable, in presence of the counsel in the cause." This is a civil case, and the principle asserted in it applies with far greater force in a criminal,

and especially in a capital case. It is true, that in Shepley *a.* White, 6 New Hamp. Reps., 172, which was somewhat similar in principle, a new trial was refused. The judge who delivered the opinion in the case, after commenting upon the cases of Thayer *v.* Van Vleet, 5 John. Reps., 111, and Brown *v.* Crane, 10 Johnson, 239, concludes as follows: "The principle to be deduced from these cases seems to be a sound one. If the jury, after an adjournment, put a question respecting the facts of the case to the court, it will be irregular to state the evidence relating to it; but if they desire instruction upon a mere question of law, that may be answered. It should undoubtedly be answered in such a way that the parties may have an opportunity to have it corrected, if there is error in the answer; and in this way, all the rights of both parties are secured as effectually as if the answer was given in open court." This also was a civil case, and we doubt exceedingly whether the learned court who decided it, would have sustained such a proceeding in a capital case. The last paragraph of its opinion shows very clearly that it ought not to be applied in such a case, because if the verdict is for the prisoner, it is conclusive; and the error (if such error produced it) could not be corrected; and it is the duty of the court to hold the scales of justice even between the prisoner and the State.

The second error assigned is that "The indictment is bad, because it contains abbreviations and contractions in various parts, such as the "&" for "and." & is not a letter, but a character which represents the word *and,* and nothing else—it would be better to use the word itself. This character, however, although it may have been discarded by some classical writers and others who are very nice and particular in regard to their style of writing, has generally obtained, been long in common use, is as well understood as the word "and" itself, and is not therefore obscure, ambiguous or likely to deceive or mislead; and it is only such as are ambiguous or obscure that render an indictment bad. An indictment ought to be certain to every intent and without any intendment to the contrary. 1 Chity's Cr. L., 306. Cro. Eliz., 490. Cro. Jac., 20. But this strictness does not so far prevail as to render an indictment invalid in consequence of the omission of a letter which does not change the word into another of different signification, as *undertood* for *understood.* and *receiv'd* for *received.* 1 Leach Cr. Ca., 134, 145. And if the sense be clear, nice objections ought not to be regarded. 1 Chitty's

Cr. L., 172. 2 East., 259, 260. We therefore think that this objection is not sustained.

The third error assigned is that "There did not appear of record that the Grand Jury had ever found *"a true bill,"* and though the court has ordered the record to be altered, it could not be done."

The record, as we have seen, commences as follows, to wit:—"Pleas at the Court House in the town of Monticello, Jefferson County, in the State of Florida, on the first Monday of December, in the year one thousand eight hundred and forty-eight, before the Circuit Court of law for the county aforesaid," saying nothing of its being an adjourned term. And the next entry, (after setting out an affidavit, warrant and commitment, &c., which are no part of the record,) is as follows: "And at another day, to wit, on the 29th day of November, in the year one thousand eight hundred and forty-eight, at the *October adjourned term* of the Circuit Court of Jefferson County, the following entry was made among the records of the court, to wit: The Grand Jury came into court and presented the following bill of indictment, to wit: The State of Florida *v.* Thomas J. Holton, Felony, a true bill." This is all that the record contains respecting the finding of the Grand Jury in this case; and by another part of it we are informed that the words "a true bill" were not in the record until after the verdict was found and judgment rendered thereon, when the court ordered that it be inserted *"nunc pro tunc;"* and the right of the court to make this order, at that stage of the proceedings, is denied by the counsel for the prisoner, and may well be doubted. But from the view that we have taken of this case, we do not deem it necessary now to decide that question, as we have come to the conclusion, after a due examination of the record and the most mature deliberation, that there is no proper showing by the record that any bill of indictment for murder was ever found by a Grand Jury against the prisoner, and that the first error assigned is well sustained. The clerk has, after the entry of the finding above mentioned, spread *in extenso* upon the record a paper purporting to be an indictment against the prisoner for murder, which, he says, is a copy of the said bill of indictment, with the endorsements thereon; and, at the foot of it, he says "Endorsed, State of Florida, *v.* Thomas J. Holton, Felony, found at November term, 1848." Now an indictment found at November term, 1848, is not an indictment found (as stated in a former part of the record,) at the *October adjourned term*

1848. The clerk states further that this indictment was endorsed "Allen R. McCall, Foreman," but there is nothing in the record to show that Allen R. McCall was foreman of a Grand Jury at either the October adjourned term, 1848, or at the November term, 1848, if any such term was holden. There was not, however, any statute authorizing such a term to be held, and it is presumed that none such was holden; and if the bill was in fact found a true bill at the *October adjourned term*, the record should have shown when the original session commenced, but it does not. Chitty, 1 Cr. L., 331, says: "If an indictment is taken at an adjourned session, it must be shown when the original sessions commenced, as well as when the bill was preferred, in order to show that it is within the time prescribed by the statute." And see The King *v.* Fisher, 2 Strange, 865; 3 Bac. Abr., title Indictment, page 94, letter K. The caption of an indictment is a formal statement of the proceedings, describing the court before whom the indictment was found, the time and place where it was found and *the jurors by whom it was found*, and these particulars it must set forth with sufficient certainty. 1 Chitty's Cr. L. 326.—5 Bac. Abr., title Indictment, 93. This record does not show the name of the judge who held the court, unless we can infer it from finding the name of a judge signed to a bill of exceptions, after the trial was over; nor does it set forth the names of the Grand Jurors who found the alleged indictment, or even show that one was empanelled at either of the terms of the court mentioned. It is possible that these two last mentioned defects might have been amended, if the proper steps had been taken in time, but that would have availed nothing; for, if we could presume that the court was holden at the time prescribed by law, and by the proper Judge, and that a Grand Jury was duly empanelled and sworn, and that Allen R. McCall was foreman of it, when the record states that the Grand Jury found "a true bill" against Thomas J. Holton for *felony*, we think that we are not warranted in saying that they agreed upon finding and did find a "true bill for murder." The fact that a paper called an indictment for *murder* is spread out *in extenso* on the record does not cure the defect, which is, that, by the record it also appears that the Grand Jury *did not find a true bill for murder*, but only for *felony*.—It has been suggested that the word "felony" might be rejected as surplusage; but it would read that the Grand Jury came into court and presented an indictment against Thomas J. Holton "a

true bill" without showing for what; which would not help the matter. Felony is a generic term, which includes all capital crimes.—4 Blackstone's Comm., 63. Davis' Cr. L., 62. In Cawood's case, 2 Virg. Cases, 541, the record showed that the Grand Jury were regularly empanelled and sworn, that they found many bills of indictment and made several presentments, and then, *having nothing further* to present, were discharged. In the record of the proceedings of the Grand Jury there was no entry of any bill being found against the prisoner; the paper, however, which was copied into the record as the indictment, had on the endorsement "a true bill," and this endorsement was signed by the person who was foreman of the Grand Jury at the term at which the prisoner was arraigned. It was stated in the proceedings had upon the trial, the prisoner "who stands indicted for murder, was led to the bar and thereof arraigned, and pleaded not guilty to the indictment." Held, that the prisoner did not appear by the record to have been indicted; that the failure to record the finding of the Grand Jury could not be supplied by recording the paper purporting to be an indictment,, nor the endorsement thereon, and that the subsequent plea of "not guilty," pleaded by the prisoner, did not cure the defect of the record. The Grand Jury cannot find one part of the same charge to be true and another false; they must either maintain or reject the whole, and therefore if they endorse a bill or indictment for murder *"billa vera se defendendo,"* or *"billa vera,"* for manslaughter and not for murder, the whole will be invalid and may be quashed on motion. 1 Chitty's Cr. L., 322, and authorities there cited in note (e). 2 Hale, 162.—So we think of a finding for *felony* on a bill of indictment for *murder*. Felony comprises every species of crime which occasioned, at common law, the forfeiture of lands and goods. This most frequently happens in those crimes which are punished with death. 4 Black. Comm., page 94.

The second section of the act relating to crimes and misdemeanors, (Duval's Comp., 113,) declares that any person convicted of murder, rape or arson shall be punished with death. Here, then, there are three felonies enumerated in the very section which provides for the punishment of murder. Manslaughter, too, is a felony at common law and is so regarded throughout this State. In all trials for that offence the prisoner has always been allowed his twenty peremptory challenges, under the 14th section of the act of Novem-

ber 19th, 1828, for the apprehension of criminals, &c., which says: "In all cases of felony the accused shall have a right of peremptory challenge of twenty." Upon an indictment for murder the jury may acquit of the malice aforethought and murder, and find guilty of manslaughter. 1 Chitty's Cr. L., 638, and authorities there cited in note. *Non constat* but the Grand Jury could not agree upon a finding for murder and so found for *felony* in this case.

The fourth and only remaining error assigned is that "The court erred in refusing instructions asked as an amendment to those granted."

The instruction asked and refused was as follows: "But if the jury believe from the evidence that the prisoner did not think the blow was likely to produce death, then that the jury should acquit the prisoner;" and we think that the court did right in refusing it.—Had it clearly appeared that he so thought, or had a right so to think from the size of the stick used, still he would not have been entitled to an acquittal—it would only have reduced the offence to manslaughter. This assignment, therefore, is overruled. But, for the reasons above stated, upon the *first* and *third* errors assigned, we are of opinion that the judgment of the Circuit Court of Jefferson County should be reversed, a *supersedeas* to the sentence of death awarded, that the indictment be quashed and that the prisoner be held to answer to a new bill of indictment to be preferred against him, and that the cause be remanded for further proceedings in accordance with this opinion.

*Per curiam.**

* NOTE.—The Reporter understands that Justice HAWKINS did not assent to all the views taken by the court in the foregoing opinion. No expression of dissent was heard from him, however, and it is believed he concurred in the judgment pronounced by the court.

MICHAEL FERRALL, THOMAS M. CROWELL AND LEWIS HALE, PLAINTIFFS IN ERROR, *vs.* RICHARD H. BRADFORD AND EDWARD BRADFORD, DEFENDANTS IN ERROR.

A judgment without satisfaction, recovered against one of two or more joint debtors, is a bar to an action against the others. If the parties enter into a joint obligation, it is certainly to be understood they are to be sued jointly and not severally.

If, upon such an obligation, separate suits are brought against the joint obligors, the non-joinder of all the obligors who are in full life, and who have not been discharged by the operation of a bankrupt or insolvent law, and who are of full age, may be pleaded in abatement.

Where a suit has been brought against several joint obligors and the attorney of the plaintiff is induced, by the false and fraudulent representations of one of the defendants, to dismiss the suit as to him and another, and take his judgment against the third joint obligor, the party making such representations cannot be permitted, in a subsequent suit on the same joint obligation, to avail himself of the plea of a former recovery. Nor will the fact that such representations were made by one only of the defendants make any difference—the fraud enuring to the benefit of his co-defendant, against whom also, as well as himself, the first suit was dismissed.

A demurrer of defendants to plaintiffs' replication, averring that the proceedings in the original suit were dismissed as to them, owing to certain false and fraudulent representations made by one of them to plaintiffs' attorney, whereby he was imposed upon, circumvented, and his judgment not fairly exercised, admits the fraud so set forth in the replication.

The mode or manner in which fraud is effected is not a matter of much consequence; —it is the effect produced to which the court must look, in order to see if the result is a consequence of the fraud complained of.

Where fraud is *admitted* or proved, relief can be obtained in a court of law, as well as in a court of equity; and when the defence of fraud exists at law, the party *should* avail of it there.

Error to Leon Circuit Court.

The plaintiffs in error brought an action of debt against the defendants at the Spring term, 1846, of the Circuit Court of the county of Leon, upon a bond made by defendants, jointly, for the payment of the sum of thirteen hundred dollars. To this bond there was a condition which is recited in the opinion delivered by the court.

Richard H. Crowell, one of the defendants was not served with process. The other defendants, the Bradfords, pleaded that they

were jointly, and not jointly and severally, bound, with one Richard H. Crowell and that, in the year 1843, the plaintiffs impleaded the said Crowell, in the Superior Court of the County of Leon, severally in an action of debt for and in respect of the very same identical cause of action, and recovered judgment against him, in said court, for the very same identical debt in the declaration mentioned.

To this plea plaintiffs replied: That J. B. Brown, Esq., the attorney for plaintiffs in the suit mentioned in defendant's plea, took judgment against Richard H. Crowell alone, in consequence of false and fraudulent representations made to him by Richard H. Bradford, one of the defendants—that the said attorney was imposed upon, circumvented, and his judgment not fairly exercised, and was induced to dismiss proceedings, as to the Bradfords, in consequence of the aforesaid representations.

The defendants demurred, alleging the insufficiency in law of this replication.

At the Spring term, 1848, the Circuit Court of the County of Leon, Hon. THOMAS BALTZELL presiding, the matters of law arising upon defendant's demurrer to plaintiff's replication being argued, it was adjudged that the matters therein contained are insufficient in law to maintain the action; and therefore the demurrer was sustained.

Douglas, for plaintiffs in error:

The plaintiffs' counsel contend that the judgment heretofore rendered in this case against Crowell does not bar the plaintiffs' right to recover against the defendants in error:

1. Because the whole of a joint contract is not *merged* in a judgment against one of the joint contractors. Vide Shehee *v.* Mandaville and Jamieson, 2 Cond. Rep. Sup. Ct. U. S., 362. Drake *v.* Mitchell, 3 East., 257. Brown *v.* Wooten, Croke James, 73.—Coke's Abr. Rep., 183. 1 Harr. Dig., 22. 2 Greenleaf's Rep., 191 1 Comyn's Dig. (L. 4,) title Action, 234. Bryant *v.* Withers, 2 M. & Selw., 123. 2 B. & Adolph., 892. 7 J. J. Marshal, 416. Godson *v.* Smith, 2 Moore, 157.

2. Because the joint obligation is not *extinguished* by a judgment against one of the joint obligors. See the above cited authorities.

3. The recovery of judgment against one, is no *release* to the

others. The recovery of judgment negatives the idea of a release.—The authorities cited prove this position.

4. Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract. Walker *v.* McCulloch, 4 Greenleaf, 421. Ruggles *v.* Patten, 8 Mass., 480. 14 John. Rep., 404. Dennett *v.* Chick et al., 2 Greenleaf, 191.

5. Judgment and execution without *satisfaction* is no bar to a recovery against the co-obligors, otherwise in torts. 1 Johns. Rep., 291. 3 Mol., 87. 1 Ch. Plead. 33, and note G. 2 Hen. & Mun., 358. Blumfield's case, Coke's Abr. Rep., 169. 2 Shower, 494.—3 East., 257. Walters *v.* Smith, 2 B. & Adolph., 892. Bailey *v.* Rogers, 1 Greenleaf, 186. 2 Black., 947. Reese *v.* Abbott, Cowp., 832. 2 Bailey, 411.

Should the court differ with me on these points, still we hold the replication is good and a sufficient answer to the plea. Fraud vitiates all proceedings, and those who are parties to it may not shield themselves under the effect of their own acts. If the attorney was induced to take a sole judgment against Crowell, one of the joint obligors, by the false and fraudulent representations of his co-obligors, or either of them, or by their simple misrepresentations, then the co-obligors, who have pleaded the judgment, cannot take advantage of their own wrong. Vide Simms *v.* Slacum, 1 Cond. Rep. S. C. U. S., 539. Borden *v.* Fitch, 15 Johns. Rep., 121. Fermer's case, Coke's Ab. Rep. 60. 1 Cain's Rep., 461. Sinclair *v.* Fraser, 1 Doug. 5 and note. Dutchess of Kingston's case, 1 John. Rep., 424. 1 Stark. on Evidence, 233. Winchell *v.* Stiles, 15 Mass., 230. 19 Johns. Rep., 164. Holker *v.* Parker, 2 Cond. Rep. S. C., 560.—7 Cranch., 453.

Branch, for defendants in error:

The first question in this case is—whether the plea of a former recovery by plaintiffs against Crowell, one of the joint obligors, is a bar to this action?

The bond is *joint,* and not joint and several; and plaintiffs have heretofore, in another and separate action, recovered judgment against Crowell. This suit is against the Bradfords and *likewise against Crowell.*

No principle of pleading is better recognized than that, on a joint obligation or contract, all the parties must be sued jointly. This rule is so inflexible that all must be sued, even though one has become a bankrupt. Chitty on Pl., 47, 48.

So, also, if a party bring a joint action on a joint and several bond, and one of the parties dies after judgment, he wlil lose his remedy against the assets of the deceased. Chitty on Pl., 49, 50.

To allow a party to sue the obligors of a joint obligation separately or in separate actions, would destroy the universally admitted distinction between joint and joint and several bonds or contracts.—It would virtually make joint instruments joint and several.

In this case, plaintiffs, having sued the principal and obtained judgment against him, must be presumed to have discharged the other obligors, who were only *sureties*. Crowell, having made no objection by plea or otherwise, the plaintiffs had a right to discharge the Bradfords and sue Crowell alone, as they have done. They cannot, after having elected to treat the bond as the separate bond of Crowell and under that election obtained judgment against him, now elect to treat it as the joint obligation of all the parties, and make the Bradfords liable in a new suit against all. They must abide their election.

The right of personal action against the Bradfords having been once suspended or relinquished, is gone forever, and cannot be restored by any act on their part.

Again: By obtaining judgment against Crowell, the bond or cause of action became *merged* in the judgment. It ceased to a debt of specialty and became one of record. Having thus become a debt of a *higher nature,* the bond ceased to be the *subject of future action.*

Again: Should this action be maintainable, then *two* judgments will be in existence at once against Crowell for the same debt, which clearly cannot be. Nor can the Bradfords alone be sued to avoid this difficulty; for if they were, they could show that Crowell was *jointly* liable with them, and indeed the *variance* between the *allegata* and *probate* would be fatal.

It has, acordingly, been repeatedly decided by the highest courts in this country and England, that a *judgment against one* on a joint contract and in a separate action *is a bar to an action against the other contractor.* Chitty on Pl., 53 and note. Ward *v.* Johnson, 13 Mass. R., 148. Robertson *v.* Smith, 18 Johns. R., 459. King

v. Hoare, 13 Meeson & Welsby R., 494. Gibbs *v.* Bryant, 1 Pick. R., 118. 3 Bacon's Abr., title Extinguishment, D. Willings & Francis *v.* Consequa, 1 Pet. C. C. R., 306. Beltzhoover *v.* Commonwealth, 1 Watts R., 126. Anderson *v.* Levin., 1 Watts & S., 334. 9 Pet., 8. 10 Peters, 449.

2. The replication to the second plea of former recovery, alleging that this recovery had been obtained by the *fraud of the Bradfords*, was bad, and the demurrer thereto was properly sustained.

The plaintiffs, *being parties* to the judgment, could not aver that it *was fraudulent*. *A party* to a judgment cannot impeach it collaterally. Until reversed, a judgment is in force; and being a record, no averment can be made againset its validity. Chitty on Pl., 521.—2 Black. Comm., 22. Moses *v.* McFarland, 2 Burr. R., 1005. 1 Starkie on Ev., 254. 2 Phillips on Ev., 515. Homer *v.* Fish et al., 1 Pick. R., 435. Hooks *v.* Moses, 8 Iredel R., 90. 1 Saunders, 92, (b).

HAWKINS, Justice, delivered the opinion of the court:

For the better understanding of the case at bar, the second plea of the defendants, Bradford's, is set forth at length. "And for further plea, the defendants, Edward Bradford and Richard H. Bradford, by their attorneys, J. & L. Branch, crave oyer of the said writing obligatory, and it is read to them, &c.; they also crave oyer of the condition of the said writing obligatory, and it is also read to them, in these words: 'The condition of the above obligation is such, that whereas the aforesaid Lewis Hale, Michael Ferrell and Thomas M. Crowell, are bound as bail for the said R. H. Crowell, for his appearance at the next Superior Court, to be holden in the county of Halifax, in the State of North Carolina, in a certain suit, wherein the heirs of William Crowell, deceased, are plaintiffs, and the said Crowell is defendant. Now, if the said R. H. Crowell shall appear at the said court, to be held in October next, and surrender himself in discharge of his bail, or if he shall pay the amount which may be recovered against him, then this obligation shall be null and void.'

Witness our hands and seals, this 11th May, 1841.

R. H. CROWELL, [SEAL.]
EDWARD BRADFORD, [SEAL.]
RICHARD H. BRADFORD, [SEAL.]"

"Which being read and heard, the said defendants, Edward Bradford and Richard H. Bradford, say—they became bound to the said plaintiffs by the writing obligatory in the declaration mentioned, jointly with the defendant, Richard H. Crowell, and not severally; and that the said plaintiffs, notwithstanding the said writing obligatory was the joint obligation of the said Richard H. Crowell and the said Edward Bradford, and Richard H. Bradford, heretofore, to wit: at the Spring term of the Superior Court of the Middle District of Florida, sitting for the county of Leon, in the year eighteen hundred and forty-three, impleaded the defendant, Richard H. Crowell, one of the joint obligors of said writing obligatory, severally, in a certain action of debt, for detaining and not paying the very same identical debt, and for and in respect of the very same identical causes of action in the said declaration mentioned, and that such proceedings were thereupon had in the said court in that plea; that afterwards, to wit: on the twenty-fifth day of April, Anno Domini, eighteen hundred and forty-three, the said plaintiffs, by the consideration and judgment of the said court, recovered in the said plea against the said Richard H. Crowell, the sum of thirteen hundred dollars, and one hundred and ninety-four dollars and seventy cents, and their costs about their said suit in that behalf expended; whereof the said Richard H. Crowell was convicted, as by the records and proceedings thereof still remaining in the said court more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed or made void. And this the said defendants, Edward Bradford and Richard H. Bradford, are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c."

To this plea, the following amended replication was filed: "And the said plaintiffs, Lewis Hale, Michael Ferrall and Thomas M. Crowell, by their attorneys, as to the said plea of the said defendants, Richard H. Bradford and Edward Bradford, by them secondly above pleaded, say—that they, the said plaintiffs, by reason of any thing by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants, because, they say, that, at the time of the taking of the said judgment, in said plea mentioned, against Richard H. Crowell alone, Joseph B. Brown, the attorney of record, who conducted, prosecuted and managed the suit in which said judgment

was taken for plaintiffs, was imposed upon, circumvented and his judgment not fairly exercised, and said attorney was induced to dismiss the proceedings as to the said defendants, Richard H. Bradford and Edward Bradford, and to take a judgment against Richard H. Crowell alone in said plea mentioned, in consequence of the false and fraudulent representations of the defendant, Richard H. Bradford, one of the said defendants, and this they, the said plaintiffs, are ready to verify; wherefore they pray judgment and their damages, by reason of the non-payment of their debt, to be adjudged to them, &c., &c."

By the defendants a demurrer was put into this replication, and was sustained by the court.

The plaintiffs in error have assigned the following causes of error:

1. The court below erred in sustaining the plea of former recovery, pleaded in the second plea of the defendants.

2. The court erred in sustaining the demurrer to plaintiffs' replication to said plea of former recovery.

3. The court erred in not giving judgment for plaintiffs on the defendants' demurrer to plaintiffs' replication to said plea of former recovery.

4. The court erred in deciding the defendant's plea of former recovery against the said Richard H. Crowell a bar to plaintiffs' action.

Two questions raised by the pleadings and by this assignment of errors, present themselves for the consideration of the court.

First. Where there is a joint obligation given by three persons, and judgment is taken only against one, whether that judgment can be pleaded in bar to a subsequent suit upon the same cause of action, by the other parties to the instrument?

Second. If this plea of judgment recovered is a good bar to the subsequent suit, the next inquiry is, how far its effect can be counteracted and avoided by the false and fraudulent representations of the party setting up this bar; and owing to which judgment in the original suit was taken against Richard H. Crowell alone, without joining the Bradfords, his co-defendants?

We will discuss them in their order; and as to the first point, we are clearly of opinion, that a judgment, *without satisfaction*, recovered against one of two or more *joint* debtors, is a bar to an action

against the others. We are aware that there have been conflicting decisions upon the question; but we must decide it upon what we deem *principle,* and upon the authority of decisions entitled to the greatest respect, not only for the reasoning contained in them, but for their having been made by judges of the highest character and reputation.

If parties enter into a *joint* obligation, it is certainly to be understood they are to be sued *jointly,* and not *severally.* It is part of their bargain, and they have a right to insist upon its fulfillment. In the words of C. J. Spencer, "Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken *severally* to pay, *separate* suits may be brought against each; but when their undertaking is JOINT, unless they waive the advantage, by not imposing a plea in abatement, they must be sued *jointly,* if in full life, and neither has been discharged, by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy."—Robertson *v.* Smith *et al.,* 18 John. R., 477.

The principle we have laid down is to be found in all the text books. In Chitty on Pl., 48, we find that, where there are several parties, if the contract be *joint,* they must all be made defendants." So in Comyn Dig., tit. action, K. 4, "a recovery against one obligor and execution, will be a bar in debt against the other." It is true, that in the same work, tit. as above, L. 9, it is said: "So a recovery and execution against one, where the thing demanded is certain, is no bar in another action, against another, upon the same foundation—as if two be bound by a bond, a recovery and execution against one, is no bar to an action upon the same bond against the other obligors." Baron Parke, in a case to be cited hereafter, remarked, in relation to this last clause in Comyn, "that it is merely a repetition of the old cases relating to joint and *several* bonds," and such seems to have been the opinion of C. J. Spencer.

We are aware, that in stating our conclusion, we may be said to have impugned a decision of the highest legal tribunal in our country, the Supreme Court of the United States, and that decision, too, pronounced by Chief Justice Marshall. Shehee *v.* Mandeville, 6 Cranch, 263. Delicate must be the task at all times of criticizing an opinion emanating from such a source—bold, perhaps, the tribunal that may differ from its conclusions; and we are free to admit,

that in that case the rigid technicalities of the law were made to succumb and give way to equity and justice. There certainly seems something exceedingly unjust in one partner, receiving the profits of a partnership for a long period of time, and upon the concern becoming unsuccessful, concealing his interest, and leaving a third person to bear the loss; besides, if he were a secret partner, how could the creditor learn whom to sue? But *ita lex scripta est.* The case at bar stands upon a different footing; the suit was upon a bond—in which, of course, all the names of the obligors were clearly and distinctly set forth.

The decision, however, in Shehee *v.* Mandeville, has been directly overruled in this country, and in England. In Ward *v.* Johnson, *et al.*, 13 Mass., 148, it was quoted by the plaintiffs, and its doctrine denied by the court, Justice Wilde holding: "This being a joint action, to support the declaration, a joint subsisting cause of action must be shown against both the defendants. (There had been a previous judgment against one of the defendants, upon the same cause of action.) "We know of no principle of law," he further says, "which can authorize us to give separate judgments in an action on a joint contract."

In the case before cited, 18th Johnson, it was commented upon at large by C. J. Spencer, and received his decided disapprobation, and the principle contained in it was overruled by the court. So, too, in Peters' C. C. Reports, 301, Judge Washington says: "a judgment against one partner extinguishes the simple contract debt as completely as if one had given his bond for it." This same principle is sustained in the courts of Pennsylvania. 9th Sergeant & Rawle, 142; 1 Watts & Sergeant R., 339, and in the latter case, the decision of Shehee *v.* Mandeville, is not considered as authority, though with an expression of regret by the court that it had been overruled, as "its justice might have supported it."

Chancellor Kent, in Penney *v.* Martin, 4 Johnson Ch. Rep., 567, approves of the decision in the case of Willings & Francis *v.* Consequa, 1 Peter C. C. R., 301, before cited, and refused even in equity to enforce the rights of a creditor against a dormant partner. The decisions in Peters' C. C. Reports, and that of Penney *v.* Martin, were made several years posterior to that of Shehee *v.* Mandeville.

The general principle as asserted by the court, is fully sustained also by a solemn decision of the Court of Exchequer in England,

King and another, *v.* Hoare, 13 Mee. & Welsby Repts., 495. The case of Shehee *v.* Mandeville was cited before that court, but it was not deemed satisfactory, and was disregarded. In this case, there are some dicta of Baron Parke upon the subject of extinguishment, and sustaining the argument of counsel for the defendants. He remarks that "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because thereby it is reduced to a certainty, and the object of the suit attained, and it would be useless and vexatious to subject the defendant to another suit, for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem adjudicatum*. The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true, where there is but *one cause of action*, whether it be against a single person or many." With these remarks, we dismiss the first point in the case, and we come now to the second.

This involves a question of more difficulty, inasmuch as we can find no case precisely analagous, to assist us in coming to a conclusion. The facts succinctly are these: The plaintiffs in the court below took judgment against only one of the joint obligors, and when that fact is pleaded by the defendants in bar, they reply that they did only do so, because their attorney was *circumvented* and *induced to dismiss* the proceedings as to the other defendants, in consequence of the *fraudulent representations* of one of the defendants.

It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defence, arising from a state of facts which they themselves by their fraud have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defence, to take advantage of their own wrong—a defence admitted to arise from their own fraudulent act. The question now is, will such a defence be available, tolerated, or allowed? Law, reason, justice and morality, unite in a negative response.

Lord Coke says, that "fraud and deceit by him who is trusted is most odious in law." "The common law doth so abhor fraud and

covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixt with fraud, are in judgment of law wrongful and unlawful." 3 Reports, Fermer's case.—Lord Mansfield, too, (Cowper, 434,) remarks: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13th and 27th Elizabeth."

Fraud will vitiate any, even the most solemn transactions, and an asserted title to property founded upon it is utterly null. 15 Peters' S. C. R., 594. 2 Howard, 284. No doubt a record may be affected and even vitiated by fraud. White *v.* Hall, 12 Vesey, 324. Hampson *v.* Hampson, 3 Vesey & Bea., 42. But this principle of fraud is so generally admitted, it is useless to multiply authorities.

We do not deem it imperative, as contended for by counsel, that the plaintiffs should be driven into a court of equity for redress, if a fraud has been perpetrated. We consider the defence to the plea in this case, as set forth in the replication, a good one at law. Judge Story remarks: "To remedy defects in common law proceedings, is the principal reason of interference—that a wrong is done for which there is no plain, adequate and complete remedy in the courts of common law." 1 Story's Equity, 53.

It is an admitted principle that a court of law has a concurrent jurisdiction with a court of chancery in cases of fraud. The principles as to fraud may be often more correctly applied in a court of equity than in courts of law. Chancery can compel discovery of facts which a court of law cannot. Fraud may frequently be presumed in equity by the chancellor, while at law, it is the province of the jury to find the facts and determine their character, under the instruction of the court. 8 Peters, 244. 12 Ibid, 11. 10 John R., 462. 4 Wash. C. C. R., 662.

The Supreme Court of Massachusetts, in speaking of this subject, hold this language: "But when a court of law has regularly the fact of fraud *admitted* or proved, no good reason can be assigned *why relief should not be obtained there*, although not always in the same way in which it may be obtained in a court of equity." Boynton *v.* Hubbard, 7 Mass. R., 112.

So in the case at bar, *the fraud is admitted;* then why should not the court act upon it? A chancellor, too, might feel no little diffi-

dence in allowing an appeal to his jurisdiction, when a good defence existed at law, of which the party had not availed himself; and we all know that negligence in this respect meets with no favor in a court of equity.

At the first blush we thought we discovered some difficulty arising from the fact that only *one* of the defendants is alleged to have been guilty of the fraud, but it soon disappeared; for we find this principle broadly laid down—that interests gained by one person by the fraud of another cannot be held by them; otherwise fraud would always place itself beyond the reach of the court. 4 Iredel Eq. Rep., 219, citing Bridgman *v.* Green, 2 Vesey, 627. Huguen *v.* Basely, 14 Vesey, 273.

Again, a plea which is bad in part is bad *in toto*. If, therefore, two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both; for the court cannot sever it and say that the one is guilty and that the other is not, when they all put themselves upon the same terms. Chitty on Pl., 598 (7th Am. ed.) 1 Saunders' R., 28, note 2. So an entire plea cannot be good in part and bad in another part, because such entire plea is not divisible. 1 Saun., 27. Stephens on Pl., 448. 1 T. R., 40. 3 T. R., 376. 3 Mass., 310. 7 Cranch., 159. 7 Cowen, 330.

In relation to the doctrine of *transit in rem adjudicatum*, a maxim borrowed from the civil law, we are free to admit that it would have been available but for the fraud of those setting it up against the plaintiffs, inducing them to single out one of the joint obligors against whom to take judgment; and we are disposed to carry out the civil law doctrine of the *restitutio ad integrum*, so far as the defendants are concerned, by restoring the plaintiffs, as near as may be, to the same state in which they would have been but for the fraud of the defendants. Of course, we are not to be understood as intending to set aside the judgment against Crowell, in this collateral way. It would have been better, no doubt, for the plaintiffs to have had it reversed or vacated before the second suit was brought. Crowell was not served with process in the last suit, so that there cannot be two judgments against him. That a legal anomaly, two judgments on a joint cause of action, has, by the peculiar circumstances of the case been produced, must be admitted. But who occasioned it? Who is to complain? Crowell will scarcely do so, and the defendants have no right to be querulous, estopped as they are by their acts and

their own conduct in the premises. If the plaintiffs in this case were to be turned out of the court, an anomally far more to be regretted, involving the strongest principles of justice, would arise, viz: a deep, palpable wrong, without a corresponding remedy. We have argued this case, of course, as it stand upon the pleadings. Whether fraud *actually* was committed, or not, is a question easily solved by the creation of an issue of fact in the court below, to which the parties are remitted.

With these views we are opinion that the judgment of the court below should be reversed. It is therefore ordered that it be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Per Curiam.

DANIEL MCRAENY, TRUSTEE, &C., PLAINTIFF IN ERROR *vs.* WILLIAM JOHNSON AND WORMLEY R. MOORE, DEFENDANTS IN ERROR.

The trustee of a married woman is the proper person to bring an action at law for asserting or defending the legal title, and every action founded on such title must be brought in his name.

The fact that the property, for an injury to which the action is brought, was in the actual possession of the *feme* at the time of the injury, does not change or affect the right of the trustee to sue.

When the deed of trust allows the property to remain in possession of a married woman, her possession is consistent with the deed, and she is to be regarded as the agent of the trustee.

The right of action, in such case, cannot be in the husband and wife, the *cestui que trust*—he having neither the ownership nor possession.

Wherever the trust would be supported in equity, the right of the trustee will be supported at law.

The trustee is the owner and has all the remedies devised by law for any injury done to the property in his charge.

In cases of injury to slaves, the American courts give a more enlarged protection than prevails in cases of *mere* chattels. They are moral and sentient beings, and the right of the master to maintain trespass for any battery of his slave is clear and well settled.

McRaeny, Trustee, vs. Johnson and Moore.—Argument of Counsel.

This was an action of trespass, brought in the Circuit Court of Leon county, by McRaeny, Trustee of Rebecca C. Williams, against William Johnson, Daniel Johnson, Wormley R. Moore and James G. Wells, claiming damages for a trespass which was alleged to have been committed by defendants, and which consisted in assaulting and beating a certain slave of plaintiff, so that he died. Defendants pleaded not guilty.

At the Fall term of the Circuit Court of said county, in the year 1847, the Hon. THOMAS DOUGLAS, Judge presiding, the case was argued and submitted to the jury, who found the following verdict:

"The jury empannelled in this cause appeared in court and upon their oaths do say that the defendants are guilty in manner and form as the plaintiff against them has complained, and they do assess the plaintiff's damages, by occasion thereof, to four hundred and thirty-five dollars, subject to the opinion of the court upon the following points reserved:—Whether, inasmuch as the jury find that the said plaintiff claims title to the negro, Sam, under and by virtue of a deed of trust from Joseph Williams, which is on file in this cause, whereby an interest in, and the possession and use of, said slave was secured to Rebecca Williams during her life, and the said Rebecca Williams was in possession of the slave under said term, so secured to her, not then expired at the time of the alleged trespass, the said plaintiff can maintain this action; and if the court shall be of opinion that the said plaintiff can maintain this action, then the verdict is to be entered for the plaintiff, as aforesaid; but if the court shall be of a contrary opinion, then a verdict is to be entered for the defendants."

Upon this special verdict the court below, being of the opinion that the law upon the point reserved was for the defendants, gave judgment accordingly."

There were other points in the case arising out of the right of challenge, but not material to be noticed in this statement.

The plaintiff, before trial, dismissed his suit as to Wells and Daniel Johnson.

Archer, for plaintiff in Error,

I.—Contended that the court erred in deciding the point reserved in favor of the defendants;

1. Because the possession of Mrs. Williams was the possession in law of the plaintiff. 1 Chitty Pl., 175. 8 Taunt., 676.

2. Trespass lies by the legal owner though not entitled to immediate possession, when there is a destruction of the chattel. 2 Saunders' Pl., 862. 2 Saund. Rep., 479. 1 Chitty Pl., 198-200. 12 Wend., 98. 8 Metcalf, 235.

3. For injury to a slave by force trespass lies by the general owner, under all circumstances. Gilliam *v.* Senter, 9 Ala., 395. 2 Bailey, 95. Harper, 113. 1 McCord, 100. Dudley's Law and Equity Rep., 83.

II.—The court erred in allowing eight challenges to defendants in empannelling the jury.

III.—The court erred in giving judgment for all the costs against plaintiff, when the verdict was in his favor.

Randall & Thompson, for defendants in error:

The only question here is, whether the court below erred in its judgment on the special verdict. It will be seen that the jury submit to the court, whether the plaintiff had such an *actual* or *constructive* possession and also such a general or qualified property in the slave, as will entitle him to maintain *trespass vi et armis*. [See special verdict.]

The plaintiff must, at the time when the injury was committed, have had an *actual* or *constructive possession*, and also a *general* or *qualified property* therein. 3 Stephens' N. P., p. 2637. 1 Term R., 480. 2 Greenleaf on Ev., 504, 506. 4 Term R., 489. 7 Term. R., 9.

But if the general owner has parted with the possession, and the bailee *have a right to use the thing*, the constructive possession is rebutted, and he can no longer maintain *trespass*, though he retain the right of property, because he has not an *immediate* right, but only a *reversionary* right: and when that is the case, the owner cannot maintain trespass for an injury done to the property, even by a stranger, but is driven to *his action on the case*. 2 Tucker's Coms. 90, 91.

Whether the general owner can maintain trespass for the taking or injury of a chattel while in the hands of a bailee, or person having a special property, depends on the question *whether such owner has the constructive possession*. If the bailee *has a right of posses-*

sion for any time, however considerable, to the exclusion of the owner, such owner cannot maintain trespass.

Therefore, where furniture of a landlord, let with a house, was taken under an execution against the tenant, it was held that the landlord could not maintain trespass against the sheriff, for he had not the constructive possession. Ward *v.* Macauley, 4 Term R., 489.—Smith *v.* Plomer, 15 East., 607. Gordon *v.* Harper, 7 T. R. 9.—Ryan & Moody's Ca., 99. 9 Bac. Abr., title Trespass, 455, note A.

Thus it will be seen that a voluntary bailment, if it have secured to the bailee *the right of possession for any the least considerable time, to the exclusion of the owner,* such owner cannot maintain trespass for injury done during such bailment.

In the case at bar, McRaeny had neither actual or constructive possession. Moreover, he had not the right to the possession—that was in another, by a title and tenure as good as his own right to the reversion.

Now the exception to this rule yet more fully confirms the correctness of our position.

That "exception" is—where the owner has parted with his possession to a carrier, servant, &c., giving him only a *bare authority to carry or to keep, not coupled with an interest in the thing,* such owner may yet maintain this action. Stephens' N. P. 2636.

But *"e conira"*—when the authority of the bailee is something more than a bare authority to carry or to keep; when it is a vested interest in the *thing in possession, coupled with the use,* this action cannot be maintained by the general owner.

This is illustrated by the case of Hall *v.* Pickard, 3d Camp., 189. See opinion of Lord Ellenborough, 61, g., in the above case.

Now, for the American rule on this point, see Mr. Justice Washington's opinion in Corfield *v.* Corfield, 4 Wash. C. C. R., 387, in a case analogous to the one in 3d Campbell.

See further cases cited in 4th Wash. C. C. R., to wit: 1 Chitty's Pl., 166, 7.—193, 4.—150. 8 Johns. R., 337. 11 Johns., 385.—7 Johns. 9, 535.

Cases may be multiplied to any extent:—5 Vermont, 274, 328.—5 Ibidem, 622. 11 Pick., 382. 13 Johns., 141, 561. 21 Pick., 367. 1 New Hamp., 110. 4 J. J. Marsh., 18.

To get rid of this difficulty the counsel for plaintiff in error assert that the possession of Mrs. Williams is the possesion of McRaeny,

trustee, and thus seek to shelter themselves behind the principle of law that the possession of the *cestui que trust is that of trustee.*

But it must be seen that the principle cannot apply here to the *possession secured* to Mrs. Williams, individually, in the same deed that secured to McRaeny his title as trustee.

It may be true, as laid down in Tillinghast's Adams on Ejt., p. 52, that "*cestui que trust* is tenant at will to the trustee," and for the very obvious reason that, the whole estate, legal title and possession usually going to trustee, the possession of *cestui que trust* is ordinarily, in fact, but permissive by trustee, and is, in fact, his very possession.

Opinion by Justice BALTZELL:

That the owner of a slave is entitled to damages from a wrong doer for an injury occasioning his death, is not denied; but in the present case it is urged, that the trustee is not the proper person to bring the suit, nor trespass the form of action appropriate to such an injury. The slave, on whose account the action is instituted, is found by the jury in their special verdict to have been in the possession of a married woman, under a deed of trust constituting the plaintiff trustee; and whether he can maintain the action, under such circumstances, is the question.

For injuries to personal property, without a motion or carrying it away, the remedy is either trespass or case. The injury should be immediately injurious in the action of trespass, and the plaintiff should be in the actual or at least constructive possession of the chattel at the time it was injured. Arch. Pl. & Ev., p. 16, 17. Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately: the person in possession not being entitled to retain it against his will. 8th Pickering, p. 235. Bacon Abridg., title trespass, C. 7th Connecticut R., page 235. 5th Vermont R., page 97. The plaintiff must have a constructive possession in respect of the right being actually vested in him. 1 Term. Rep., 498. 3 Day, p. 498. 8 Johnson, p. 432. A general property in a personal chattel draws to it the possession in law. Bacon Abridg., title trespass, C. 7 Connecticut, 235. 5th Vermont, 97. Not only he who has the property, but also he who has the possession of goods, shall maintain trespass for the goods. 7th Comyn's Digest, 510.

Has the trustee for a married woman such property or possession by right actually vested as will enable him to maintain the action? We confess that but for the confidence with which the contrary has been maintained by learned counsel, we should have no hesitancy in giving an affirmative, as he is the proper person to bring any action at law for asserting or defending the legal title, and every action founded on such title must be brought in his name. Lewin on Trusts, p. 481, 482. The trustee cannot maintain the action in this case, it is said, because the *feme* was in the actual possession, and by the deed was entitled to it. There is nothing peculiar in this: "for," says an eminent writer, "it is a case that seldom happens, for the trustee to be in the actual possession." 1 Cruise's Digest, 489.

In the case of Haselton *v.* Gill and another, which was trover for eight cows, &c., the marriage settlement was in trust, that the trustees should permit the *feme* (about to be married) to keep and enjoy, and at her will to sell and dispose of the said cows and premises, and the increase and produce to arise and be produced from the same, for her own use, &c., and to carry on the business and trade of a cow keeper and milk-seller; and the action was by the trustees, for part of the cattle contained in the deed, and others bought with the trust money. Lord Mansfield says: "By the common law the wife can have no property during the coverture, but all her estate is in the husband. But courts of equity have for ages past thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the husband, in cases clear of fraud. This is done by the intervention of trustees, and thus far the wife is, to all intents and purposes, a single woman. And whenever the trust can be supported in equity, this court will consider the trustee entitled at law." The title having been contested as fraudulent, on account of the possession, Ashurst and Butler, Justices, say, it was consistent with the deed—the wife was the agent of the trustees—she acted as their agent, and a recovery was had." 3 Term R., p. 622, n. To the same effect, and under like circumstances, are the cases of Jarman *v.* Woolaston and another, 3 Term R., p. 622. Caddogan *v.* Kennett, 2 Conn. R., 242, and Foley, &c., *v.* Sheriff of Middlesex, stated in a note to this latter case. These were cases of trover, yet *property* is required in *it*, as well as in trespass. "When the defendant takes goods wrongfully and by trespass, the plaintiff, if

he brings trover, waives the tresspass, and admits the possession to have been lawfully gotten." Coolidge v. Chitty, &c. 1 Bur., 31.—"Two things are necessary in the action of trover—property in the plaintiff, and a wrongful conversion by the defendant." Ibid. In trover, there must be proof of actual possession, or that plaintiff was entitled to the immediate possession of the goods. 2 Phillips' Evidence, 221. 7 Term. R., 13. A case still more conclusive is that of Wooderman *v.* Baldock, being an action of tresspass, for the asportation of goods, brought by trustees, under a deed of assignment, with a clause for the trustees to permit the goods to remain in possession of the assignor—those remaining with him were levied upon, and suit being instituted, a recovery was had, no objection being raised as to the form of the action, or to their want of possession, although a new trial was moved on other grounds. 8 Taunton, 677.

Referring to elementary treatises, whilst the rule is as we have stated, as to the right of the trustee to sue, there is no exception as to any particular action, or class of cases. He is owner, and there is no reason for denying him all the remedies devised by law for redress for any injury sustained by the property under his charge. Nor is there any obstacle, on account of the interest of the *cestui que trust;* the cases just quoted speak of him as the agent of the trustee; others, of his possession as the "very possession of the trustee," and not liable to be displaced by it, however long continued, the holding not being adverse. Hill on Trustees, 266. Adams on Ejectment, 52. Such right to the possession, it is said, is recognized in equity only. Lewin, 481. Again: *cestui que trust* is regarded as tenant at will and at sufferance of the trustee. Hill, 266. Lewin, 481. In Dane's Abridgement, as mere borrower of goods from the trustee. 4 Dane, 249. Courts of law do not distinguish between a suit brought by trustee against his *cestui que trust,* and that by another person. 8 Term Rep., 122, 123. Nor are trustees for married women, as has been insisted in argument, mere nominal appointments, or dry trustees; on the contrary, we find them classed amongst the trustees clothed with active duties. Hill, 545. Where, then, is the pretext for considering their interests and rights as distinct or separate? If the provision, entitling the *feme* in a trust deed to the possession, may not be noticed or asserted in a court of law, by what rule or right can it avail a stranger claiming its protection,

not only adversely, but in a manner to annihilate and destroy, as well the possession as the interest and property itself?

It is sought to bring this suit within the authorities holding that trespass will not lie in cases where there is a bailment or right of possession derived from the owner. To this it may be answered, that if the trustee of Mrs. Williams, by his implied sanction, had hired the negro for a term, and during its continuance the injury had been committed, there might be pretext for the argument, though even in such case the destruction of the chattel, for obvious reasons, will give right of action even against the bailee. 1 Chitty Pl., 171.

In cases of injury to this peculiar species of property, the American courts, by a spirit of enligtened humanity, have extended a more enlarged protection than prevails in cases of mere chattels; it is said, "slaves are, by the operation of our law, deprived of all personal rights, yet they are moral agents, subject to the same feelings, and have a right to protection from abuse, as other human beings." Whilst different remedies have been used, "they all, either impliedly or expressly, admit the right of the master to sustain trespass for any battery of his slave. 2 Bailey, 95. Harper, 113. 1 McCord, 100. 11th Alabama, 395, n. s.

The right of action for the injury in the present case, is asserted to be in the husband, Williams, and his wife the *cestui que trust,* but he has neither the ownership nor possession—neither a right in law, nor one in fact. For him to maintain the action, is to permit him to defeat his own deed, and destroy the very interest he had vested in the trustee. We are satisfied that the trustee is the person to bring the suit, or thre is no remedy—that it was his duty to have brought the action, and that it was rightly brought.

The judgment of the court below will be reversed and set aside, and the cause remanded, that a judgment may be enterd on the special verdict for the plaintiff in that court.

ALBERT G. PORTER, PLAINTIFF IN ERROR, *vs.* PAUL R. BEVILL, DEFENDANT IN ERROR.

The act of 1843, T. Dig., 340, does not authorize the admission in evidence of such records or judicial proceedings from other States as are plainly irregular, or defective, or void, but only such as are valid between the parties.

If it appears from the record of the judicial proceedings of a court in another State, that a judgment was rendered against a party not legally summoned, the judgment will be considered here as void, just as such judgment would be regarded, if rendered in this State against a person not legally summoned.

When the courts of this State are required to sanction and enforce the proceedings of the courts of other States, the regularity of such proceedings can and ought to be inquired into.

Where the rule of court in a sister State, made in pursuance of authority given by law, requires in any given case personal service of notice of any proceeding, or publication in a gazette or newspaper, and no such notice or publication appears in the record of the proceedings offered in evidence in the courts of this State, such proceedings, so far as concerns the party here, against whom they are attempted to be enforced, will be regarded as *coram non judice*, and not binding upon him.

Error to Jefferson county Circuit Court.

This cause was tried at the Spring Term of the Circuit Court, sitting in and for the county of Jefferson, in the year 1845, the Hon. GEORGE S. HAWKINS, Judge, presiding.

An action of *assumpsit* was brought on the copy of a note, which had been established by certain proceedings in the Superior Court of Effingham county, in the State of Georgia, a certified copy of which proceedings was offered in evidence on the part of the plaintiff in the court below, and held not to be admissible. A full statement of the case, and of the proceedings had in the State of Georgia, is contained in the opinion delivered by the court.

Archer, for Plaintiff in Error.

Call, for Defendant in Error.

Opinion by Justice LANCASTER:

Upon the trial of this cause in the court below, the plaintiff offered in evidence a copy from the record of the Superior Court of

Effingham county, in the State of Georgia, of certain proceeding had in the said court, wherein Albert G. Porter was petitioner, and one Stephen P. Bevill and Paul R. Bevill were made defendants—the object of said proceedings being to establish a copy, in lieu of a note alleged to be lost, which said copy is certified by the clerk of said Superior Court of Effingham county, Georgia, to be a true copy of the proceedings had in said Superior Court, and his seal of office is thereto annexed. To the introduction of which in evidence, the defendant by his counsel objected—which objection was sustained by the court, and the said certified copy of the record ruled to be inadmissible. To which ruling the plaintiff excepted—which was signed, sealed and made part of the record in this case.

The question of this court to adjudicate is, whether the copy of the proceedings, certified as above, was admissible as evidence against this defendant, or not?

By the act of the year 1843, Thompson's Dig., 340, it is enacted: "The records and judicial proceedings of any court of another State, or of the United States, shall be admissible in evidence in all cases in this State, when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed."

A literal construction would seem at once to exclude these proceedings from being admitted as evidence; they do not purport to be original, but only a certified copy from the original. This question is not deemed necessary to be adjudicated in this case. But if it were conceded that the provision of the act before recited, authorized the admission in evidence of certified copies, so far as the authentication is material, it seems in due form.

This court cannot understand that it was the intention of the Legislature, by the above recited enactment, to authorize the admission in evidence of such records, or judicial proceedings, from other States, as are plainly irregular and defective, or void; but only such as are sound and valid between the parties by whom, and against whom, they are sought to be used. A judgment obtained in this State could not bind a person not a party to it; nor yet a person sought to be made a party, unless he voluntarily appeared, or was duly and legally cited to make his appearance and defend. The same must be true of all manner of judgments obtained in other States. The courts have no jurisdiction over a defendant in an action who has not been

legally summoned to defend, and who has not appeared, and judgment against such an one is void.

This court is aware of the judicial courtesy due between States of the Union, under the constitution of the United States, and are disposed so to construe the before recited section of the act of 1843, as to give due faith and credit to their records and judicial proceedings. We may add that we feel every proper respect for the judiciary of our sister State, Georgia, but this should not deter or prevent us from looking at the regularity of judicial proceedings sent hither from there, when we are required to sanction and enforce them.

By the 28th section of the before recited act, Thompson's Dig., 342, all the courts of law in this State are authorized to admit the printed statutes of any of the States, when published by authority and commonly read there, as *prima facie* evidence of the law in such State.

By the judiciary act of the year 1799, the Superior Courts of Georgia were authorized to establish copies in lieu of lost papers, according to law and equity, and to make such rules for their government in the premises as they should think meet. Prince's Dig., 206. Under the authority of that act, the judges of the Superior Court established a rule that it is necessary for a person seeking to establish a lost paper, "to present to the Superior Court a petition, together with a copy in substance of the paper lost as nearly as he can recollect, which copy shall be sworn to by the party, or proved by other evidence. Whereupon a rule *nisi* may be obtained, calling upon the opposite party to show cause (if any we have) why the copy should not be established in lieu of the original so lost—which rule shall be personally served on the party, if to be found in the State—and if he cannot be found, then the said rule shall be published in some public gazette in the state, for the space of three months."—Appendix to Hotchkiss' Dig. L, of Ga., p. 949. By reference to the copy of the record offered in evidence, it appears that the petition filed in Effingham Superior Court was sworn to, but not the copy of the note sought to be established. The note sought to be established is in the following words, to wit: Scriven County, December, 1841. On the first day of January next, I promise to pay to Paul R. Bevill, or bearer, one hundred dollars, for value received.

(Signed,) STEPHEN P. BEVILL.
(Indorsed,) PAUL R. BEVILL."

This, then, is an effort to establish a note alleged to be lost, and an endorsement thereon upon an affidavit appended, not to the copy of the note, as required by the rule of court, but to the petition in which both the form of the note and endorsement are indistinctly set forth; it is not said by whom the endorsement was made. Upon this showing, a rule *nisi*, was obtained for the defendants, Stephen P. Bevill, the obligor, and Paul R. Bevill, the alleged endorser, to show cause. That rule was executed, in the following manner, as appears from the certified copy of the proceedings: "We acknowledge service of this petition and rule, 30th March, 1843.

STEPHEN P. BEVILL,
PAUL R. BEVILL,
per Attorney.
STEPHEN P. BEVILL."

Upon which service so executed, the defendants were afterwards called, but answered not, and judgment was rendered against thm, and the said copy established to stand in the place of the original. It nowhere appears that Stephen P. Bevill was the attorney of Paul R. Bevill, authorized to acknowledge service for him; his assumption of that authority is not sufficient evidence that he possessed it. Either a power of attorney for that purpose should have been exhibited, or satisfactory evidence of his authority been given.

There was, then, no personal service of the rule *nisi* on Paul R. Bevill, nor advertisement in a public gazette in the State of Georgia, as required by the rule. It is not shown he had notice of the proceedings, or that he made defence to them, nor is it constructively inferable. As to him, therefore, the said proceedings were plainly *coram non judice*, and are void and do not bind him. The certified copy of the proceedings offered in evidence, as against the said defendant, are, therefore, inadmissible as to him.

This renders any examination of the reasoning on which the court below proceeded unnecessary; but the opinion of that court, ruling out the testimony, was correct, and must be affirmed with costs.

JOHN MCDOUGAL, ADMINISTRATOR, &C., OF JOSEPH W. LEA, *vs* ANDREW J. LEA, EXECUTOR OF JOHN WILLIAM LEA, DECEASED.

A plea that is founded upon the idea that the cause of action arose in a particular county from the fact that probate of the will was made and defendant undertook and assumed the duties and responsibilities of the office of executor in such county, only goes to the *right of action*.

The statute which requires a party to be sued in the county of his residence or in that where the cause of action accrued, relate to the cause of action and not to the right to sue.

When the plaintiff's replication alleges that the cause of action accrued in the county where the suit is brought, and the defendant demurs, the demurrer admits that the cause of action did accrue in such county, and consequently that suit is properly brought in that county.

This was an action of assumpsit brought in the Circuit Court for the County of Leon by McDougal, Administrator of Joseph W. Lea, against Andrew J. Lea, Executor of John William Lea, deceased. The cause of action, as set forth in the declaration, was an account for money paid, laid out and expended by plaitniff's intestate, to and for the use and at the special instance and request of defendant's testator, in his life time.

The defendant pleaded that he was not a resident of Leon county, but of the County of Madison; and that probate of the will of his testator was had in the County of Wakulla, in which his testator resided at the time of his death; and that the cause of action declared upon accrued against him in the county of Wakulla.

To this plea there was a replication to the effect that the cause of action, in the plaintiff's declaration mentioned, accrued to the plaintiff's intestate in his life time and against defendant's testator in his life time, in the county of Leon.

To this replication the defendant demurred and the court below sustained the demurrer. Judgment for defendant at the Spring term, 1848, of Leon County Circuit Court, Judge BALTZELL presiding.

Archer, for plaintiff in error.

Call, for defendant in error.

Opinion by Chief Justice DOUGLAS:

This cause was brought up by writ of error from Leon Circuit Court. The declaration contains but a single count, and that is for

ey by the said Joseph Lea paid, laid out and expended to and
ıe use of the said John W. Lea, and at his special instance and
st. "To this declaration the defendant put in a plea alleging
ıe is not a resident of Leon county, but that he resides in Mad-
:ounty, in the Middle Circuit of the State of Florida, and that
robate of the will of John Williams Lea was had in the county
akulla and State of Florida, where the said John Williams Lea
d at the time of his death, and the cause of action above de-
l upon accrued against this defendant, as executor, as aforesaid,
e county of Wakulla aforesaid, where the defendant undertook
ssumed the duties and responsibilities of the office of executor of
st will and testament of said John Williams Lea, and not in the
y of Leon. To which plea the plaintiff replied that the said
ıl causes of action, in the said declaration mentioned, accrued
e said Joseph Lea in his life time and against the said John
ms Lea in his life time, in the county of Leon afore-
To this replication the defendant put in a demurrer, upon
ı issue was joined, and the court below, after argument, sustained
:murrer and held the replication to be bad.
e error assigned is this: "The court erred in sustaining the
dant's demurrer to the plaintiff's replication.
d, upon a full consideration of the question presented, we think
rror well taken. The question arises upon the provisions of the
ection of the act of November 21st, 1829 (Duval's Comp., 106,
ıpson's Digest, 320, No. 4,) which says, "Summons *ad re-*
lendum shall be made returnable to the Court having jurisdic-
)ver the County in which the defendant resides, or the cause of
ı accrued; and the cause shall not be tried in any other Coun-
with certain exceptions not affecting this case and therefore not
sary to be stated. The plea proceeds upon the idea that the
of action arose from the fact that probate of the will of John
ea was made in Wakulla county and that the defendant there
took and assumed the duties and responsibilities of the office of
tor, &c.; but this only goes to the *right* of action. The
te relates to the *cause* of action and not merely the *right* to sue.
ı Andrew J. Lea made probate of the last will and testament of
Williams Lea and took upon himself the duties and responsi-
es of the office of executor of said will, it gave to the plaintiff a
to sue him as such executor, provided he had a *pre-existing cause*

of action. The declaration alleges such pre-existing cause of action, to wit: money paid, laid out and expended by the said Joseph W. Lea, (of the goods and estate left by whom, at the time of his death, the said plaintiff is administrator,) to and for the use of the said John W. Lea, in his life time. This cause of action the plaintiff, in his replication alleges accrued in Leon Coutyn; the defendant, as his plea shows, resides in Madison county, and, so residing, might have been sued there. The demurrer admits that the cause of action declared upon (to wit: the money paid, laid out and expended, as aforesaid,) accrued in Leon county, and, consequently, we think this suit was well brought in that county. The judgment of the court below must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Per curiam.

LEWIS HALE, MICHAEL FERRAL AND THOMAS M. CROWELL, PLAINTIFFS IN ERROR, *vs.* RICHARD CROWELL'S ADMINISTRATRIX.

It is a well settled principle that a party may resort to a court of error to obtain a reversal of his own judgment, if it has been so rendered that he may sustain injury by it.

The rule that a party shall not take advantage of an error for his benefit does not apply to errors of the court, as when it pronounces a wrong judgment.

When, in a joint action upon a joint contract, a judgment is entered up against one defendant, after having discontinued as to the other who had been in court as co-defendant, it is erroneous and fatal. This principle applies with greater force when the judgment is first taken against one of several joint obligors, and the suit is *afterwards* dismissed as to the others.

When, by the negligence or unskilfulness of an attorney, a judgment has been taken which stands in the way of a recovery, or is calculated to embarrass the plaintiff in a suit upon the original contract, and such judgment thus improvidently taken is erroneous, the plaintiff will be allowed to reverse it.

Error to Leon Circuit Court.

The plaintiffs in error, who were also plaintigs in the court below, brought their action against Richard H. Crowell, Edward Bradford and Richard Bradford, in the late Superior Court of the county

of Leon, on a joint obligation signed and sealed by defendants.—Three separate præcipes were filed by the attorney for plaintiffs, directing the clerk to issue three separate writs of summons *ad respondendum* against the defendants, which was accordingly done.

At the Spring term of said Superior Court, 1843, the attorney for plaintiffs filed a declaration against the defendants jointly, declaring on the aforesaid writing obligatory.

At the Fall term of said court, in December, 1844, the plaintiffs by their attorney took a judgment by default against Crowell, and dismissed as to the other defendants.

This writ of error is sued out by plaintiffs to reverse their own judgment, as having been improvidently taken and to their injury, and for manifest error in the proceedings.

Douglas, for plaintiffs in error:

The plaintiffs in error, who were also the plaintiffs in the court below, assign the following error as apparent of record, viz:

That the bond sued on was the joint bond of three persons and the judgment was taken by default against one of the joint obligors, and the proceedings were dismissed as to the other joint obligors.

Upon an inspection of the record the court will find that *three* several præcipes were filed and three sumomns were issued, all of which were duly executed and returned; and that the plaintiffs declared *jointly* in one declaration against all the defendants. It also appears of record that the obligation declared on is the *joint* bond of the three defendants, and not their *joint* and *several* bond.

It is one of the canons of the law of contracts that all must be sued *jointly* who have *jointly* sealed a contract and are in life. 1 Peters S. C. Rep., 81. Rice *v.* Shute, 5 Burrows, 2611. Hermer *v.* Moore, cited in same case. In this last case the judgment was *arrested* because the facts, of the plaintiff's own showing, made out that he ought not to have judgment; and these facts were: That all had sealed the bond and all were alive at the time of suit brought.

It seems to be well established law that, in all actions on joint contracts, the plaintiff is compelled to bring his action against all the parties thereto, and must recover judgment against all the *joint* contractors or none. 1 Ch. Pleadings, 32, 33, 38 and 546. 3 Term Rep. 782. 1 Hen. and Munf., 62. 3 Munf., 187. 2 Maul. and

Selwyn, 23. 2 Randolph, 446, 478, 174, 313. 2 Day's Rep., 387. 1 Hen. Blackstone, 108. 1 Saund. 207, note 2.

The only exception to this general rule or canon of the law of contracts is, where one of the *joint* contractors pleads some plea which goes to his *personal discharge;* such as bankruptcy, *ne unques* executors and the like, and not to the *action of the writ*. In cases of the latter character the plaintiff may recover against the remaining joint contractors who are not by act and operation of law discharged from the action. 1 Saund. Rep., 207, note 2. It is the practice in England, even in the case of bankruptcy or infancy, to require all the *joint* contractors to be sued. Bevil *v.* Wood, 2 Maul. & Selwin, 23. Mr. Justice Johnson, in the case of Miner *v.* Bank of Alexandria, 1 Peters' S. C. Rep., 81, says "It cannot be questioned that a joint contract by several, where all remain equally bound, all in life and all within reach of the process, more especially where they have been all actually arrested, the plaintiff must recover against all or none." This is that case; all were bound, all within reach of the process, and all served. Still more; the plaintiffs show, by their own pleadings, that they are not entitled to recover, for they declare against them all *jointly*, and take a judgment against *one* by default, and subsequently dismiss as to the others. Saddler *v.* Houston, 5 Stew. & Porter, 205. Jenkins *v.* Hunt, 2 Randolph, 446, 478, 174, 313.—2 Blackf., 121. 1 Stew. & Porter, 189, 62, 130.

It may be said that the plaintiffs in error in this case, who were also plaintiffs in the court below, are not entitled to reverse a judgment which they have erroneously taken. In reply to that we say:

1. That the plaintiffs are not to suffer for the errors, mistakes and inattention of their attorney. See the case of Holker et al. *v.* Parker, 2 Cond. Rep. S. C. U. S.

2. That nothing is more frequent than a resort to an appellate court by those who are injured by improvidently taking an erroneous judgment. To this point Geecher's case, reported in 8 Coke, 58. Croke James, 211, is direct and positive. That was a suit upon a bond, and a *nolle prosequi* was entered by the plaintiff. On a second action upon the same contract it was held to be a bar, and it became necessary to remove the judgment by a writ of error for some *technical* information, before the obligee could recover on the original contract. Croke James, 211. The case at bar is that case. An unproductive and erroneous judgment stands in the way of a recove-

ry on the original contract. The plaintiffs have been grievously injured by the unskilfulness of their attorney. This unskilfulness is now used to defeat a just demand. The record shows manifest error, and this court is now appealed to, for the purpose of removing the impediment to a just recovery and promoting the ends of justice.

Archer, for defendant in error.

Opinion by Chief Justice DOUGLAS:

This suit was instituted in the late Superior Court of Leon County by Lewis Hale, Michael Ferrall, and Thomas M. Crowell, against Richard H. Bradford, Edward Bradford and Richard H. Crowell, upon the *joint* bond of the defendants, (in the court below, for the sum of thirteen hundred dollars, payable to the plaintiffs. Process was sued out against and duly served upon all of the said defendants, and the declaration filed in the case is in the usual form in debt, charging all the defendants *jointly.* Judgment by default for want of plea, was rendered against Richard H. Crowell only, for the said sum of thirteen hundred dollars debt, and one hundred and ninety-four dollars and seventy cents, making together the sum of fourteen hundred and ninety-four dollars and seventy cents and costs, &c.—Whether on motion of the attorney for the plaintiffs or not, the record does not state; but it shows that he was present, and he seems to have acquiesced in it, for immediately after it was entered, the suits against Richard H. Bradford and Edward Bradford were dismissed "by consent of parties, by their *attorneys.*" Since the rendition of said judgment, the defendant, Richard H. Crowell, has departed this life, and this suit is prosecuted by the plaintiffs in error, (who were also plaintiffs in the court below,) to reverse their own judgment, on the ground that it was improvidently taken by their attorney, and tends greatly to their injury. The error assigned is, that the bond sued on was the *joint* bond of three persons, and the judgment was taken by default against one only of the *joint* obligors, and the proceedings were dismissed, as to the other joint obligors. The defendant in error appears by her counsel, but makes no objection.

That a party may resort to a Court of Error, to obtain the reversal of his own judgment, if it has been so rendered that he may sustain injury by it, is a principle too well settled to be now contested. Johnson *v.* Jebb, 3d Burr Reps., 1772. 2 Eng. Comm. Law cases, 255, is a leading case upon this subject, and it was likewise so held by this

Court, in the case of Ward and May *v.* Bull and Shine, 1 Florida Reps., 275, where a number of authorities in point are cited, but a number more might be added; it is also laid down in 2 Tidd's Pr., 1134, and 1 Archbold Pr., 232. The only opinion is, whether this is a case proper for the application of the principle, and we think it is. In Capron *v.* Von Noorden, 2 Cranch, 126, 1 Peters' Cond. Reps., 370, Mr. Capron (who was plaintiff below) sued out a writ of error, and assigned for error that the record did not show that the Circuit Court had jurisdiction, the parties not being described so as to show they were within the provisions of the act of Congress. "The only question submitted to the court was, whether the plaintiff could assign as error his own *omissions* and *irregularities* in the pleadings. The defendant did not appear, but the citation being duly served, the judgment was reversed." The rule that a party shall not take advantage of an error for his benefit does not apply to errors of the Court, as where it pronounces a wrong judgment. Cross *v.* The United States, 1 Gallison's Reps. 26. In the case of Teal *v.* Russell, et al., 2 Scammon, 319, 321, it was held that where an action is brought against several, and a plea is filed as to one, and the default of the others is entered, it is erroneous to take final judgment against them until the plea is disposed of. The court say, "it was clearly erroneous in the Circuit Court to render a judgment against McClure and Russell, during the pendency of the plea filed by Peyton. If issue had been joined on that plea, the proper course would have been to have sworn a jury, as well to try the issue joined as to assess the damages, as to those who had suffered the default. Until the plea filed by Peyton was disposed of, no judgment could regularly be entered against the other defendants; and although the judgment against McClure and Russell was in favor of Teal, yet the law is well settled that the plaintiff may have his own judgment reversed. Judgment reversed." In Jones *et al. v.* Wright *et al.*, 4 Scammon, 338, 339, Catron, Justice, delivering the opinion of the court, said: "This suit was brought against Wright and Jackson on a promissory note, process was served on both the defendants, and Jackson appeared and pleaded the general issue. At a subsequent term, without noticing this plea, a judgment by default was taken against him, the damages assessed, and execution awarded. Afterwards Wright appeared, and filed a plea, on which issue was taken, and a jury called, when the plaintiff submitted to non suit as to him. Execu-

tion had been issued against Jackson, and returned *'nulla bona.'*— To reverse this judgment against Jackson, the plaintiffs have prosecuted this writ of error, that they may commence their action anew." The question was, whether the plaintiffs could obtain a reversal of their own judgment, and after citing Capron *v.* Van Noorden, 2 Cranch, 126, Teal *v.* Russell, *et al.*, 2 Scam., 321, Johnson *v.* Jebb, 3 Burr, 1772, and 2 Tidd's Practice, 1134, the court proceeded: "Without going further into the authorities, it is clear that a plaintiff may obtain a reversal of his own judgment, for irregularities which may have intervened in the court below, in order that he may commence another suit, and obtain a regular and valid judgment, as well as where errors have been committed against him."— And Beecher *v.* Shirley, reported in 8 Coke, 58, and Croke James 211, also sustains this principle.

Another question presented for our consideration is, what was the effect of rendering judgment against Richard H. Crowell *only*, and then dismissing as to the two Bradfords. It is to be recollected that Crowell could not have pleaded a non-joinder of parties, because when the judgment against him was rendered they were parties to the suit, and such a plea would have been contradicted by the record. In Sadler *et al. v.* Houston and Gillespie, 1 Stewart and Porter, 206, service of the writ was effected on both the defendants. "There does not," said Ch. J. Lipscomb, "appear to have been any appearance, unless we can infer the presence of the defendants, from the manner in which the clerk has entered the judgment." The case is first stated of Houston and Gillespie against both defendants; he then goes on to say, "the parties appeared by their attorneys, and the said plaintiff dismissed *his* suit against the said Mary Sadler, and the said defendant said nothing in bar, &c., concluding a judgment of *nihil dicit* in the usual form. The error assigned is in entering up judgment against one only, after having discontinued against the other defendant, who had been in court as co-defendant."

"That such a discontinuance is error and fatal, has been ruled (said the Chief Justice) by a series of decisions in this court, and it will be only necessary to refer to the cases. The case of Smith *v.* Hill, 1 Stewart and Porter, 62. Adkin *v.* Allen, ibid 130. Brahan *v.* Johnson, ibid, 189. Roberts *v.* Johnson, 2 Stewart, 13, and Thompson *v.* Saffold, *et al.*, 2 Stewart, 494. The principle (he says) is acknowledged in all these cases, and we are fully satisfied

of its soundness." And if it is thus conclusive, where the suit was dismissed as to some of the joint obligors, or contractors, before judgment against the others, "*a fortiori,*" it must be so, where the judgment is first rendered against one obligor, and the suit is afterwards dismissed as to the others. In King's administrators, *v.* Anthony, 2 Blackford, 131, the court held, that "if the plaintiff in an action against two, proceed to judgment against one alone, and the record do not contain a return of the writ that the other had not been found, and a suggestion of such return, the judgment will be reversed in error." In Jenkins *v.* Hart's Commissioners, 2 Rand. 447, the Court held, that in a joint action upon a joint contract, (the very case at bar,) the plaintiff must have judgment against all the defendants, or he can have judgments against none. In the case of Newnan *v.* Graham, 3 Mum., 187, 188, the Court of Appeals of Virginia, upon the authority of the case of Leftwick *v.* Berkley, 1 Hen. & Mum., 62, held, "that in an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be *dead,* it is a fatal error, though not pleaded in abatement, and is not cured by verdict." That case is analogous to the case at bar in this, that the defendant did not crave oyer of the bond, but a copy of it was nevertheless annexed to the transcript of the record by the clerk, as in this case. But there is an essential difference between them in this: the bond in that case (as shown by the copy) was *joint* and several—while in this it is *joint* only: in that the defendant appeared and pleaded—in this, there was judgment by default. The court decided the case according to the showing of it, which the plaintiff had made in his declaration, and so we deem it proper to decide this.

A *nolle prosequi,* or dismission, is simply an agreement not to proceed further in the suit, as to the particular person, or cause of action. 2 Saunders' Reps. 207, note 2, and authorities there cited.

Holker *et al, v.* Parker, 7 Cranch, 436, 2 Peters' Cond. Reps., 560, is cited as an authority to show that plaintiffs should not be permitted to suffer, on account of the errors or mismanagement of their attorney. But the case of Beecher *v.* Shirley, 8 Coke, 58, and Croke James, 211, above cited, is an authority more directly in point. That was a suit upon a bond; the defendant, Shirley, pleaded payment, and it was found for him; but the court being in doubt upon a point of law which arose in the case, after divers motions, the plaintiff, Bee-

ıer was content that a discontinuance should be entered, but by the *egligence of his attorney,* a judgment was entered, which it became ecessary for him to remove by writ of error, before the obligee could ecover on the original contract. He sued out a writ of error, which as sustained, and the judgment was reversed. That is precisely ıe case before us. Here an erroneous judgment, improvidently ıken, as appears by the attorney of the plaintiffs, stands in the way f a recovery, (or is calculated at least to embarrass the plaintiffs ery much in a suit) upon the original contract; the plaintiffs having een injured by the unskilfulness of their attorney, there is manifest rror in the record. The judgment of the court below is, there- ɔre, reversed, but at the cost of the plaintiffs.

Per curiam.

OHN B. DOGGETT, PLAINTIFF IN ERROR, *vs.* MARCELLUS JORDAN, DEFENDANT IN ERROR.

: is erroneous so to instruct or charge a jury, as to leave the whole case to the *opinion* of the jury, without reference to the testimony. If a charge is so framed, the jury may suppose that they are at liberty to find their verdict upon what they know of the case, irrespective of the evidence before them.

he question whether a partnership exists between parties, is a question of fact for the jury to determine, upon the evidence adduced, under the instruction of the court, if asked, as to what, in law, constitutes a partnership. It is error to tell the jury that a partnership exists, and that a defendant is liable in consequence of such partnership. Such a charge is erroneous, because it is both as to the law and the fact, and the court is, therefore, not warranted in giving it.

he jury should be told by the court that they are the sole judges of the facts, and that it is not only their right but their duty to find according to their own views of the proofs before them, regardless of any opinion the court may entertain in reference to such proofs.

. charge to the jury upon the facts of the case is in violation of the express provisions of the act of the General Assembly of January 3, 1848, entitled "An act to amend the several acts regulating judicial proceedings."

Doggett vs. Jordan.—Statement of Case.

It is error not to reduce to writing the charge given by the Court upon the law of the case. The act of January 3d 1848 makes it the duty of the judge presiding upon the trial of common law causes to charge the jury *only* upon the law of the case, and points out the manner of such charge, and directs that it shall be wholly in writing.

Error to Leon County Circuit Court.

This was an action *assumpsit,* brought by Jordan against John B. Doggett and Henry Doggett, in the Circuit Court of Leon county, claiming the sum of one thousand dollars, for services as an over seer, alleged to have been rendered the defendants in the years 1843 and 1844, at a plantation in Leon county, called the Black Creek plantation. Henry Doggett was not served with process, but the plaintiff, under the provision of the judiciary act of this State, elected to proceed against John B. Doggett, who was served. The cause was tried before the Hon. THOMAS BALTZELL, at the Spring Term of the Circuit Court of the county of Leon, 1848.

The bill of exceptions shows the following state of facts, as proved at the trial. The plaintiff introduced a witness, who testified that he, plaintiff, was overseer on the Black Creek plantation, which belonged, to Henry Doggett, during the years 1843 and 1844. That John B. Doggett told witness that he had hired plaintiff to oversee said plantation—and that, since the commencement of this suit, he had told witness that he had hired plaintiff for his uncle, Henry Doggett. That John B. Doggett, so far as witness knew, had no interest other than eight hands working on the plantation, and that he informed witness that these were placed there to help his uncle to work out of debt. Witness also proved that plaintiffs' services as overseer were worth $400 or $500 per annum.

Plaintiff here rested his case, and introduced no other testimony.

Defendant then proved by Hardy Gaskins, a witness called to testify on the part of defendant, that he was present in the State of North Carolina, in 1842, when Henry Doggett employed plaintiff as an overseer for his Black Creek plantation—John B. Doggett was not present. That plaintiff continued in the employment of Henry Doggett during the years 1842, 1843, and 1844; but that in the latter part of the year 1844, he was engaged on another plantation.—That plaintiff complained to witness in the spring of 1845, that Henry Doggett had left Florida for North Carolina, without paying him for his services. Plaintiff made no allegation of any claim against

hn B. Doggett at that time, nor did witness ever hear of any such im until the commencement of this suit. Henry Doggett had ty hands, and John eight. That the plantation belonged to Hen—that John brought his hands to this country in 1842, and owned land, so far as witness knew. That John lived on the plantation, d acted as the agent of his uncle.

Defendant proved by another witness, that in 1846, plaintiff had ven him a draft on Henry Doggett, for some six or eight hundred llars, which he requested witness to present to him in North Caro-a, and collect if possible. That plaintiff at that time said noth-g to witness about any liability of John B. Doggett to him.

James J. Barnes was sworn, and testified that he was employed to ersee the Black Creek plantation in 1844—that he was employed Henry Doggett—that John B. Doggett's slaves were there, and rkd as they had when plaintiff was overseer at that plantation—at witness never looked to John B. Doggett for his pay—that the antation belonged to Henry, and that John acted as the agent of the l man.

Defendant also exhibited a receipt, dated in January, 1845, signed plaintiff, for the sum of two hundred dollars paid him by Henry oggett, in part payment of plaintiffs' services as overseer on the ack Creek plantation.

After argument of counsel, the court below charged the jury, as set forth fully in the opinion pronounced by this court. To all nich charge, and to the refusal of the court to give the instruc-on asked by defendant's counsel, (also stated in the opinion,) the fendant by his counsel excepted.

Branch for plaintiff in error:

The liability of John B. Doggett is alleged in the declaration *to be int with that of Henry Doggett.*

The evidence, therefore, to entitle Jordan to recover in this ac-on must show their *joint* promise or *assumpsit*, or it must arise from e fact that they were partners. The joint liability of John B. Dog-tt can in no other way be established, and the expression in the harge of the Court, "liable as partner or otherwise," can mean thing more.

It is not pretended there was a *joint* promise, nor does the evi-

dence in the remotest degree show there was; nor, indeed, is there evidence that John B. and Henry Dogggtt jointly mployed him, from which a joint promise or liability might be implied. Then as there was no joint promise, the only other way in which John B. Doggett can be made *jointly* liable is upon the presumption, which seems to have been adopted by the court, that *there was a partnership.*

To constitute John B. and Henry Doggett *partners,* there must have been a participation mutually *in the profits.* This is the test 3 Kent. Comm., 23, 25, 28. 2 Greenleaf's Ev., 393-'4-'5.

There is no evidence whatever that John B. Doggett ever received one cent of the profits, or anything else, or that there was any agreement that he should. The proof is, that he was merely an agent of his uncle, Henry Doggett, without any interest in the plantation *or the profits thereof.*

Nor is it pretended that either John B. or Henry Doggett ever held themselves out to the world as partners. The evidence is to the contrary, and shows that it was well known that they were not.

If, then, John B. Doggett was liable neither on a joint promise, nor as a partner, the court erred in instructing the jury that he was, and, *a fortiori, that he was liable for the whole amount of Jordans' claim.*

If the court should hold, that John B. Doggett was liable as a partner, then *the judgment should have been against both,* both being sued.

Upon either hypothesis, the judgment is erroneous—for if a partner, the judgment should have been against both, and joint; or if he was *not a partner,* the court erred in instructing the jury that he was *liable for the whole claim.*

If Jordan had a demand against John B. Doggett, for his care and diligence in overseeing his hands, he could not recover in this action but should have sued John B. Doggett *individually,* in a separate suit. This action is against John B. Doggett and Henry Doggett, *on a joint liability,* and a judgment could not be taken *against one,* on a separate and individual claim.

As to the effect of the receipt and draft given by Jordan on Henry Doggett, for the claim now sued for, the court should have instructed the jury that they were *prima facie* evidence that Jordan gave the credit to Henry Doggett alone, and that if he now sought to make John B. Doggett liable, he should explain or rebut their effect by

other evidence. Instead of this, the court instructed the jury in such a manner as to mislead their minds.

In relation to fourth error, see Acts of General Assembly, passed 1847-'8, page 12.

The court also erred in refusing to give the instruction asked by defendant's counsel. Possession of personal property is ordinarily evidence of title. But where the property is admitted to be in another, the only inference from the lawful possession of negroes, is that the party in whose possession they are either *hired* them from the owner, or that they were loaned to him.

In this case, the property in the eight negroes was admitted to be in John B. Doggett, and the possession of Henry Doggett to be lawful. Is it not, then, a legitimate presumption, in the absence of proof to the contrary, that John B. Doggett's negroes were hired by Henry Doggett?

One thing, however, is certain—that the possession of John B. Doggett's negroes by Henry Doggett, or the fact that they were at work on Henry's plantation, does not, *per se* or *prima facie*, make John and Henry partners. If it did, persons hiring out their negroes would run great risks by being, without their knowledge or consent, made partners of persons totally insolvent, and, as in this case, might subject themselves to heavy losses.

Long & Walker for defendant in error:

This was an action of *assumpsit* brought by plaintiff against John B. Doggett and Henry Doggett, to recover compensation for services alleged to have been rendered as overser on a plantation, called the "Black Creek plantation," in the years 1843 and 1844. Process was not served on Henry Doggett, and the sheriff having returned that he did not reside in Leon county, the cause proceeded against John B. Doggett alone. See Thompson's Digest, 327, sec. 3. 9 Mass. R., 300.

The substance of the charge of the court, as we understand it, was that if the jury believed from the evidence that the plaintiff had rendered services to John B. Doggett and Henry Doggett jointly, and had not agreed to look to Henry Doggett alone for payment, then that John B. Doggett was jointly liable for the whole amount of the plaintiff's wages. See Addison on Contracts, 214, 876, 880. 9

Mass. R., 300. If this position be correct, then the first and second errors are not well assigned.

The third error assigned we think is founded in mistake of fact.—It will be seen by reference to the testimony of Gaskins that the plaintiff had charge of the Black Creek Plantation for Henry Doggett alone in 1842, before John B. Doggett brought his negroes to this country. It was in part payment of the wages of that year that the two hundred dollars mentioned in the receipt was paid. The order sent by Daffin to North Carolina was for the balance due for 1842, and also for services rendered to Henry Doggett alone on his Jefferson county plantation, in 1844. The verdict of the Jury was for services rendered to John B. Doggett and Henry Doggett jointly on the Black Creek plantation, in 1843. 5 Mass., 196.

The fourth error assigned is also founded in a misapprehension of the facts. The court did reduce to writing every thing it charged "as to the law of partnership."

It is deemed a sufficient answer as to the sixth error assigned, *to* say that it was the duty of the jury to draw their own presumptions from the testimony before them.

In answer to the seventh assignment we say that the refusal *to* grant a new trial was matter of practice which cannot be assigned for error in this court, and if it could be, no sufficient ground for a new trial was shown.

Opinion by Chief Justice DOUGLAS:

This suit was instituted in the Leon Circuit Court by Marcellus Jordan, the plaintiff in the court below, against John B. Doggett, the plaintiff in error, and Henry Doggett, against whom summons *ad respondendum* issued, which was returned by the sheriff endorsed in these words: "Executed by serving a copy hereof on John B. Doggett—Henry Doggett does not reside in this county."

The declaration contains several counts in *assumpsit,* all in the usual form, upon a claim for services charged to have been rendered by the said Marcellus Jordan to the said John B. Doggett and Henry Doggett, as overseer of a plantation. To which declaration the said John B. Doggett put in a plea of *non assumpsit* and issue was joined therepuon, and the case was submitted to a jury who returned a verdict for the plaintiff and assessed his damage at fourteen hundred

and eighteen dollars, for which sum a judgment was entered, and that judgment has been brought up to this court by writ of error.

The record contains a bill of exceptions that sets forth the evidence adduced to the jury, and goes on to state that "after argument of counsel the court instructed the jury that, if they were of opinion that the negroes proved to be owned by John B. Doggett were actually hired to Henry Doggett, and the former was agent of the latter merely, they will find for the defendant.

"If the jury shall be of opinion that there was no hiring, then that, in general, the liability of a party depends upon services rendered to him. That, in this case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett was responsible to the plaintiff to the extent of his interest, certainly. Wheher liable to the extent of the claim as partner, or otherwise, is a question of greater difficulty; but the court inclines to the opinion that he is, and so instructs the jury. This is the general rule, and its operation may be avoided by evidence that the plaintiff agreed to look to one of the parties and not to the other for payment, and that a receipt in part payment to one of the parties does not confine the liability to him nor prevent the operation of the contract as to the other."

The court, further, as to the responsibility of John B. Doggett as part owner of the negroes, informing them as to the law of partnership, instructed the jury, "if they were satisfied that defendant and Henry Doggett were partners in the business of farming, then the defendant was responsible, as a partner, to the plaintiff, jointly with Henry Doggett, for the services rendered."

The following are the errors assigned, to wit:

First. The court erred in instructing the jury that John B. Doggett was liable for any part of Jordan's claim as overseer.

Second. The court erred in instructing the jury that John B. Doggett was liable, as partner or otherwise, for the whole of Jordan's claim.

Third. The court erred in instructing the jury that Jordan has a right to look to John B. Doggett for his pay as overseer, after he, Jordan, had recognized Henry Doggett as *his sole debtor,* by receipting to said Henry Doggett for part of his pay and drawing a draft on him for the same; and in not instructing the jury that such receipt

and draft were *prima facie* evidence that Jordan recognized only Henry Doggett as his debtor and looked to him alone for pay.

Fourth. The court erred in not reducing to writing and incorporating in his charge to the jury what it instructed the jury "as to the law of partnership."

Fifth. The court erred in entering judgment against John B. Doggett *alone*, if John B. Doggett was liable as a partner of Henry Doggett.

The *sixth* it is not deemed necessary to notice, and the *seventh* and last was abandoned at the argument of the cause.

The first and second may well be considered together, for although the latter is somewhat more extensive than the former, both are deemed erroneous and for similar reasons. They are both founded upon that part of the charge in which the court instructed the jury that, "if the jury shall be of opinion that there was no hiring, then that, in general, the liability of a party depends upon services rendered to him; that, in this case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett is responsible to plaintiff to the extent of his interest certainly. Whether liable to the extent of the claim, as partner or otherwise, is a question of greater difficulty; but the court inclines to the opinion that he is, and so instructs the jury."

The first thing which presents itself to our notice in this charge is, that the whole matter appears to have been left to the opinion of the jury, without any reference to the testimony. There are few points upon which jurors are more apt to mistake, than in supposing that they may find their verdict upon their own knowledge of the case, acquired before they took their seats in the jury box. We presume this was an inadvertence of the learned judge who tried this cause, as it is one that often happens in other courts, and it may have had no material bearing in this case; but we can readily imagine cases where thus to charge might have a very injurious effect, and have therefore deemed it not amiss to mention it, *en passant*, as we think care should always be taken to instruct the jury that they must base their verdict upon the evidence adduced before them. "The jurors are triers of the facts not upon their own personal knowledge," but from the evidence thus adduced. Clark *v.* Robinson, 5 B. Monroe's Reps., 55. 2 Supp. to the U. S. Digest, 763, No. 232. The Uni-

ted States *vs.* Fourteen packages, &c., Gilpin's C. C. Rep., 235. 1 Starkie on Ev., 405. 3 Black. Comm., 374.

Again, the jury were charged in substance that, if there was no hiring in the case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett was responsible to the extent of his interest certainly.—This, however, we think does not necessarily follow. The eight negroes might have been lent by John B. Doggett to Henry Doggett as an act of kindness by the former to the latter, or Henry Doggett might have held them as guardian of John B. Doggett, or, indeed as a mere wrong doer, or in some one of various other ways that may be imagined, without rendering John B. Doggett liable to the plaintiff for overseer's wages.

But the Court added "Whether liable to the extent of the claim, as partner or otherwise, is a question of greater difficulty; but the Court inclines to the opinion that he is, and so instructs the jury." This is the first time in the whole case that anything is said in the record about a partnership. The defendants were not sued or declared against as partners, and the testimony, the whole of which is set out in the bill of exceptions, no where speaks of them as partners.—Yet it was not only left to the jury to find that John B. Doggett was liable to the whole extent of the claim as such partner, but they were expressly charged that he was so liable, or otherwise.

The most objectionable feature, however, in this instruction is, that it is compounded of both law and facts. For instance, whether a partnership existed, or not, between John B. Doggett and Henry Doggett, at the time when the services sued for in this action were rendered, was a question for the Jury to determine upon the facts of the case, under the instructions of the Court, if instructions were asked as to what in law constituted a partnership; but here the fact of partnership is assumed by the Court and the jury specially instructed that the defendant, John B. Doggett, is liable, and thus to assume (where, as in this case, if there was any evidence of partnership it was very slight, wholly inferential, the fact contested and the testimony contradictory,) and to charge both upon the law and the fact was erroneous. McRea *v.* Smith, 4 Rand. Reps., 463. Plater *v.* Scott, 6 Gill & John Rep., 116. Fowler v. Lee, 4 Munf. Rep., 373. McElderry *v.* Hannagan, 1 Harr. & Gill Rep., 308. Kendall *v.*

Hughes, 7 B. Monroe's Reps., 371. It is true that the court further, as to the responsibility of John B. Doggett as part owner of the negroes, informing the jury as to the law of partnership, instructed them that, if they were satisfied that defendant and Henry Doggett were partners in the business of farming, then defendant was responsible as a partner to the plaintiff, jointly with Henry Doggett, for the services rendered;" but they had been, as we have seen, expressly charged before that he was so liable; and they were not, in the further instruction, informed that they were the sole judges of the facts, and that they had not only a right, but that it was their duty to find their verdict according to their own understanding of the proofs adduced in the cause, whatever views the court might entertain in regard to them. And besides, they had also been before especially charged that, if John B. Doggett was not liable to the whole extent of the claim, as partner of Henry Doggett, he was liable otherwise to that extent; so that the jury could not have found any other than a verdict for the plaintiff for his whole claim, without disregarding the instructions of the court, as they appear in the record. Perhaps, if the portion of them which was verbally given had been reduced to writing and filed, we might have found it a proper explanation of the whole matter; but unfortunately that was not done and we are compelled to decide the case upon the record as it is presented to us, and that shows a charge to the jury upon the facts of the case, which is against the express provisions of the act of the General Assembly of January 3, 1848, "To amend the several acts regulating judicial proceedings," Pamph. Laws of 1848, page 12, by which it is made the duty of the judge to charge the jury *only* upon the law of the case. In Reel *v.* Reel, 2 Hawk's N. Ca. Reps., 85, there was a motion for a *new trial* on the ground that the court intimated its opinion to the jury on the matter in issue. Taylor, Chief Justice, delivering the opinion of the court, said: "The act of Assembly relative to the duty of a judge charging forbids him to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of a jury. It is not for this court to discuss the wisdom or expediency of the law, or to pervert its true construction under a belief that no mischief can be produced thereby, or even that justice can be more substantially administered." A new trial was therefore awarded. The 9th section of the 6th article of the constitution of Tennessee provides: "That judges shall not charge the jury with

respect to matters of fact, but may state the testimony;" and under this provision the Supreme Court of that State, in the case of Ivey *v. Hodges*, 4 Humph. Reps., 154, held "That the judge had *no* right to declare what is proved, but simply to state what is sworn to; that the truth of the statements of witnesses and the deductions to be drawn therefrom must be left to the jury." Cited in 1 Supp. to the U. S. Dig., page 170, No. 294.

The facts should be left to the jury whose peculiar province it is to say what effect they shall have. 10 Peters' S. C. Reps., 98. It is the province of the jury to weigh and decide on the sufficiency of the evidence. Greenleaf *v.* Birth, 9 Peters' S. C. Reps., 299.

As to the *third* error assigned we think that the receipt and draft therein mentioned should have been left to the jury with the other evidence in the cause, as testimony conducing to prove that Jordan recognized only Henry Doggett as his debtor and looked to him only for pay.

The *fourth* error is undoubtedly well assigned. It is, that "The court erred in not reducing to writing and incorporating in its charge to the jury, what it instructed the jury 'as to the law of partnership.'"

The act above cited, sec. 1, provides: "That hereafter, upon the trial of all common law causes in the several courts of this State, it shall be the duty of the judge presiding on such trial, to charge the jury *only* upon the law of the case and in the manner following, that is to say, the said judge shall only charge the jury upon some points of law or exceptions to evidence arising on the trial of said causes; and said charge shall be *wholly* in writing." The second and third sections contain provisions on the subject not deemed material to the decision of this cause. But the *fourth* provides: "That *all such instructions*, as well those given as those denied, and also as well those prayed for by the parties as those declined by the said judge, shall be signed and sealed by the said judge and form a part of the record in the cause." In this case exceptions were taken to the whole of the charge, and that important portion of it does not appear. Yet the clerk of the court from which this record comes, has certified that it is a true transcript of the record and proceedings, &c. The provisions of the statute last mentioned are restrictive and mandatory, not merely directory; and whatever views we may entertain as to their wisdom or expediency, it is our duty to obey them, and a failure so to do is error.

The *fifth* error alleged seems to have been assigned under a mis-

apprehension of the provisions of our judiciary act, the 12th section of which (Duval's Compilation, page 92, Thompson's Digest, p. 327, No. 2,) declares: "That when any original writ or summons has been sent out against two or more defendants, and returned by the sheriff or other officer served upon one or more of the defendants, and that the other defendants do not reside in said district or county, as the case may be, it shall be lawful for the plaintiff, at his option, to proceed to judgment against those upon whom process has been served, or to obtain from the court time to perfect service, &c." We have seen that the summons in this case was issued against John B. Doggett and Henry Doggett, and that it was returned "served on John B. Doggett, and that Henry Doggett did not reside in this [Leon] county." This brings the case within the provisions of that statute; the plaintiff elected to proceed to judgment against John B. Doggett, the defendant upon whom process had been served, and we see no reasons to doubt his right to do so. The fifth error, therefore, is not sustained.

That errors should occasionally be committed by the most astute and able judges, in the hurry of the trial of cases at *nisi prius*, is a matter that need not excite surprise in the mind of any one. The only wonder is that they do not more frequently occur, and especially in the charge of the court to the jury, which must often be given immediately after the close of a long and tedious examination of testimony, complicated and perplexing, out of which important, difficult and not very familiar questions of law frequently arise. But when they do take place it is not therefore the less our duty to correct them. And here it may not be improper to remark that there are no two matters in the exercise of judicial authority, about which a judge should be more careful than in not permitting the jury to usurp the power of the court, to decide questions of law, and in not himself invading the province of the jury to respond to the facts of the case.

Believing that the facts of this case were not properly left to the jury, and that, if they had been so, the verdict might and probably would have been different, and the Judge having failed to reduce the whole of his charge to the jury in writing and file it, according to the requirements of the statute upon the subject, to which we have above referred, the judgment of the court below is reversed, the verdict to be set aside, a *venire de novo* awarded, and the cause remanded for further proceedings in accordance with this opinion.

Per curiam.

Sibley vs. Maria, a woman of color.—Points decided.

SAMUEL S. SIBLEY, APPELLANT, *vs.* MARIA, A WOMAN OF COLOR, APPELLEE.

7. O., of South Carolina, devised the greater part of his real and personal estate to W. H. upon the condition that a certain slave and her four children, as his property and under his protection shall be allowed all the privileges of free persons in the State of South Carolina consistently with good order and a proper subordination, and shall be allowed out of the property devised to W. H., two hundred and fifty dollars each, to be paid them at such times and in such quantities as, in his judgment, will be most proper;—otherwise, they are to be taken to the State of Ohio, and the balance of the money, over and above what will be expended in their passage, to be paid to them there; and in case the said W. H. should refuse or neglect to comply with the conditions herein expressed, or should die without an heir, then, in either of these cases, all the interests, rights and emoluments left by the will to W. H., to go to J. H.

Held, first—That W. H. takes the estate devised to him, subject to certain conditions subsequent, which, unless he performed, a limitation over to J. H. is created, and is termed a conditional limitation.

Second.—The testator by such a will, manifests unequivocally his intention that the slaves shall be free, and this is shown by the declaration that they shall enjoy all the privileges of free persons, &c., if they remain in the State—as well as by the wish expressed, that if they do not remain, they be taken to the State of Ohio.

Third.—A solemn trusts is clearly created by the terms of the will involving the freedom of slaves, and the greater part of the testator's estate is devised, subject to and conditioned upon this trust.

Fourth.—That portion of the will which provides that the slaves shall have the privileges of free persons is void, because it is a condition inconsistent with the gift, and incompatible with the relation of master and slave.

Fifth.—Such privileges would also be inconsistent with the laws and policy of South Carolina, where the will was made. This portion of the will could not, therefore, have been carried out.

Sixth.—The intention of the testator being to give the slaves their freedom could have been carried out by taking them beyond the limits of the State—there being at the time of the probate of the will no law to prevent it in South Carolina.

Seventh.—The taking of the slaves to Ohio, was regarded by the testator as a *dernier* means of giving them freedom. No rational intendment other than that of freedom can be made or inferred from the direction to remove them to Ohio, and to pay them money when there.

Sibley vs. Maria, a woman of color.—Statement of Case.

Eighth.—In the absence of any proof to the contrary, the presumption is, that the devisee, executed and performed the trust reposed in him, the general rule being, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown.

Ninth.—The will not having pointed out within what time the condition was to be performed, the law presumes that it must be done within a reasonable time.

Tenth.—If not performed within a reasonable time, then the ulterior legatee might claim the estate for condition broken—subject, however, in his hands, to the same condition.

The establishment of the right of the mother to freedom by the courts of Florida, does not infringe upon the policy of this State, owing to our statute in relation to the manumission of slaves, the presumption being that she was free when she came here.

This was an action of trespass, instituted by the appellee in the Circuit Court of Leon county, at the Spring term, 1847, for the purpose of establishing her right to freedom, under the will of William Oliphant, made in South Carolina in 1837, and admitted to probate in that State in 1828.

The defendant pleaded not guilty, and that plaintiff was a slave.

The case was tried at the Spring Term, 1848, before the Hon. THOMAS BALTZELL, Judge, presiding in said court.

After the proofs were submitted to the jury, and after argument of counsel, the court charged the jury as follows, viz:

That it was the duty of the executor under the will, to give freedom to the slave, according to its provisions, and that, in the absence of all testimony on the part of both plaintiff and defendant, as to the mode in which she has been held, or is now held, and after the lapse of time, the jury may infer that that duty was performed.

That the bequest of the will imposes a duty and trust, and the presumption of law is, that it has been performed.

That a fraudulent disposition, in opposition to and in defiance of the will, would not confer a right on defendant.

That the law of South Carolina having received a judicial construction by the courts of the State, their decision is conclusive in reference thereto, and according to that construction, the bequest gave clear and indisputable right of freedom to plaintiff.

Defendant by his counsel prayed the court to instruct the jury (among other charges asked,) that if they believed that emancipa-

was prohibited by the *laws* of South Carolina, (except by the slature,) at the time the will under which the plaintiff claims lom was made, then plaintiff is not entitled to her freedom, and should find for defendant." But the court refused to give the uction asked, as well as others prayed by defendant. To which ıal, and to the instructions given, the defendant by his counsel ɔted.

ɨpy, for appellant:

ıe right claimed by the appellee in this case is based upon the of William Oliphant, executed in South Carolina in the year

will be observed, by reference to the copy of this will to be d in the record, that there is no provision which expressly directs appellee to be emancipated. She can, then, only claim by con-ɛtion.

ıe is given to the legatee, W. H. Hollingsworth, as his property, directs that she be permitted to enjoy the privileges of a free ɔn. This direction is manifestly void, because it is a condition ısistent with the gift. No person can be a slave, the property nother, and yet enjoy the privileges of a free person. Such a lege is incompatible with the relation of master and slave, and the rights, duties and reciprocal obligations resulting therefrom. ıis provision, however, be considered as an indirect gift of free-, it is void, because the laws of South Carolina of force when will was executed, and when admitted to probate, prohibited ıcipation of slaves, except by act of the Legislature. Courts of ce will not give effect to the provisions of a will, or deed, having heir object the evasion of the settled law and policy of a State.

may, however, be insisted that the alternative part of the clause, otherwise to take them to the State of Ohio, and the balance of money bequeathed (to the slaves) to be paid them there," is suffi-ɛly explicit to obviate the difficulty presented by the statutes of h Carolina. But this is left at the option of the legatee. He l adopt either the first or the latter part of the clause.

ıt the will does not direct what shall be done with them, after reach Ohio. In order, therefore, for this court to establish the n set up by the appellee, they must (there being no evidnce of

the fact) take judicial notice that the laws of the State of Ohio prohibited domestic slavery when this will was executed, and by construction, determine that the design of Oliphant was to have the appellee emancipated when she arrived there.

But conceding that the effect of the will is an express direction to take the appellee to Ohio, and there *set her free,* how is it to be enforced?—at whose instance? It is very clear that as long as the appellee remained in South Carolina, where the provisions of no will emancipating a slave could operate, or in any of the slave-holding States, (so far as her rights under this will are concerned,) she could not be free, because, if she obtained her freedom at all, it could only have been by operation of law prohibiting slavery in the State to which she might have been taken, as there is no express direction to manumit her. If this be true, and it seems to be a proposition too plain to require illustration, she must still be a slave, and must continue to be, until she is taken to a free State, with a view to free her, or until she is emancipated in the manner prescribed by law. And if she is now a slave, she has no *status* in court. In contemplation of law, slaves are mere chattels, things. They have no civil rights—they can hold no property, *nor can they bring a suit*—they can acquire no right which does not, in the instant it is acquired, pass to the master. The courts cannot interfere to compel Wm. H. Hollingsworth to perform the trust in this case, at the instance of this party, because to do so, they would be recognizing a person unknown to the law.

In the case of Frazier v. Frazier, 2 Hill's Ch. Reps., 316, which, it seems, governed, in a great degree, the decision of this case in the court below, the principle just contended for is admitted, but the court in that case decide in effect that as the bill was filed by the heirs to partition the slaves, the court would, if on looking into the will they find that the executors could execute it, by sending the slaves out of the State, order them to discharge the trust. In that case, too, there was an express direction to the executors to take the slaves to San Domingo and emancipate them, and the executors had seized the slaves for the purpose of carrying out the will. But it will be perceived that even there the slaves were not emancipated, but were directed to be taken out of the State, as expressed in the will.

It will be seen, however, by a further examination of the will, that, in the event of the failure of the first legatee to perform the condi-

ons annexed to the bequest to him, the testator bequeathes the es-
ıte given to him to John H. Hollingsworth, without any condition or
mitation expressed. The effect of this whole clause taken togeth-
·, conceding that the conditions attached to the bequest to Wm. H.
[ollingsworth were valid and binding to vest in John H. Hollings-
orth the title to the property bequeathed, as if given to him origi-
ally, upon the neglect or refusal of Wm. H. Hollingsworth to com-
ly with the conditions adverted to.

John H. Hollingsworth, then, had the right in such event to claim
ıe property, and in that case no provision is made in reference to the
ppellee. It is conceived that in such case the appellee would either
ıll into the residuum of the estate of the testator, or would be inclu-
ed in the property going over to John H. Hollingsworth. Whether,
ıerefore, the conditions annexed to the bequest to Wm. H. Hollings-
·orth are void, or whether, upon the neglect or refusal to comply
ıerewith, if valid, the property vested in John H. Hollingsworth, in
either event is the appellee entitled to recover.

If this case is to be decided as if it were now pending in the
!ourts of South Carolina, even, if there was a direct and express in-
ınction to carry the appellee out of the State into a free State, and
here emancipate her, it could not be done, because by an act of the
.egislature of that State, passed in 1841, it is expressly forbidden
or executors to carry out such direction in a will, and the courts
here have decided that the law adverted to operates as well upon
ills executed and not carried into effect before the passage of the
ct as after. 1 Richardson's Eq. Rep., 65. 2 Richardson's Eq. Rep.,
3.

But if it be insisted that this case must be decided by the laws of
his State as they now exist, it will be seen, by reference to Thomp-
on's Digest, page 533, that certain pre-requisites are necessary, in
ırder to manumit a slave here. No slave can acquire her freedom
n any other wise. In this case, there is no one to perform the re-
ıuirements of the law. Let it be recollected that, under the will, the
ppellee could not be emancipated, except by operation of law in
he State to which she might be taken, and if not until then, she
nust still be a slave. Now, then, can the court listen to her claim,
gainst the consent of the party holding her as a slave, and grant her
reedom before the right of emancipation is vested.

It would only be necessary for a person desiring to emancipate a

slave in this State to go into an adjoining State, whose laws permit it, and there, by deed or otherwise, manumit her, deliver her into the possession of another, have her brought here and sue for freedom, in order to evade the law which requires all persons desiring to manumit a slave to give bond to send such slave out of the State within thirty days.

These laws in relation to emancipation are founded in high public policy, and are enacted to preserve the institutions peculiar to the Southern States. Courts of justice are careful not to countenance any attempt to evade them, and will not give their sanction to any efforts to render them nugatory by schemes, however artfully concontrived, to set them at defiance.

It is better even that cases of transient injustice should be endured, than that the general law and policy of the country should be disturbed.

The court below charged the jury, that there being no evidence of the manner in which the appellee was held, the presumption arises, that Wm. H. Hollingsworth discharged the trust in the will to set her free, and that, therefore, she was entitled to her freedom. But with all deference to that court, how could such presumption arise, in the face of the fact that she was held as a slave, admitted by the very suit itself, and that the laws of this State and of South Carolina forbid emancipation, except under certain forms?

The only way in which the appellee could have been freed under this will, was to have been taken to Ohio with that view—and if she had been so taken, she would not now be in Florida, or if she were here, she could only be so as a slave. Thompson's Digest, 533. The presumption, then, of her present freedom, cannot arise in any view of the case; nor can the principle that the presumption of law is always in favor of liberty be invoked here. That principle had its origin in a country where slavery was and is unknown. The institution of slavery in the Southern States is unlike the systems of feudalism and villainage in England. It is more like the slavery of the Greeks and Romans, where the slaves, as our slaves, had no legal rights or privileges whatever, with the exception that here they are protected by our laws from the cruelty to which the Roman slaves were exposed.

In the States of this Union where slavery exists, the black complexion affords a presumption of slavery, and a black person will so

be regarded until the contrary is shown. 2 Halsted, 253. 2 Bibb, 238. The presumption of law, *in favorem libertatis*, instead of having any application in this case, is entirely reversed. The presumption being against the appellee, arising from her complexion, it devolves upon her to *prove* her right to freedom, by proper and legal testimony. This, I apprehend, cannot be done, unless she can show that she was taken to the State of Ohio, or any other free State, with the view of emancipating her, and that her right to freedom vested accordingly.

If, however, under the most favorable view, the appellee is entitled to have the trust in the will carried out, the utmost she can claim is to have her sent to Ohio; and in that case, it being a trust, a court of law cannot afford relief, but she must resort to a Court of Chancery.

Woodward, for appellee:

This is a suit for freedom, under the will of William Oliphant, of South Carolina, made October 13, 1827, admitted to probate, January 20, 1828.

The clause containing the bequest of freedom is in the alternative, to wit: "The privileges of free persons of color, consistently with good order and subordination—or otherwise, to take them to the State of Ohio."

The object of the will is the freedom of the slave.

The instructions of the court are sustained by law.

1. As to the *duty* of the *executor*.
2. The *presumption* of its *performance*.
3. The *fraud* of *dereliction*.
4. The *judicial decisions* of a State being the *best exposition of its laws*.

The counsel cited and commented on the authorities adduced by him in reference to the instructions given by the court below, and then proceeded to establish the following propositions:

I.—A will takes effect from the *death of the testator*—rights under it accrue from that time. How, then, can a bequest revert to the testator, *'eo instanti"*—it is passing away from him forever.

II.—It is only *our own* slaves that are bound to conform to our emancipation laws. Those of other States to theirs.

III.—The right to freedom being vested by the will, at the death of the testator, a law declaring emancipation illegal can have only a prospective operation.

IV.—Emancipation not being inhibited by the laws of South Carolina—*ergo*, a provision thereof by will is NOT VOID.

V.—An *act* of the Legislature was not essential to emancipation, if the slave were to be removed beyond the borders of the State, and only in that event, claiming to be free.

VI.—The executor was bound to adopt the alternative which should *effectuate* the testator's will—his will was *the freedom of this slave*—removal to Ohio the only certain mode of accomplishing the purpose, if the other were *impracticable*, or having been attempted, had *failed*. This being the duty of the executor, it is equally incumbent upon the legatee, because expressly enjoined.

VII.—The omission, neglect, or refusal to remove the slave to Ohio, constitutes the *fraud*, against which the courts will relieve—it is the very *gravamen* of the wrong, for which this suit is seeking redress.

The appellee had a right to resort to a Court of *Equity* in South Carolina, for the enforcement of her claim. She is equally entitled to assert it in this form of action here. That court would have compelled performance by the executor, or legatee—this court can adjudge her rights in the only mode in which they can be practically exhibited in the tribunals of this State.

The assertion of a purely personal right can be restricted only by want of jurisdiction over the person against whom, or the subject matter in reference to which, it is urged. In this case, jurisdiction over the subject-matter and the person is not only unquestionable and conceded, but it is such as our courts are bound to entertain.

To sustain these propositions, the counsel cited the following authorities, viz: 1 Leigh, 465. 4 J. J. Mar., 370. 2 J. J. Mar., 475. 3 Leigh, 8, 9, 11. 2 Leigh, 189, 192, 193. 2 Hill's Ch., 303, 313. 1 Peters, 680. 2 Peters, 220, 37, 38. 2 Phillips, 296, 297, 298, 301, 302, 307, 368. 6 Con. Rep., 445. 19 Johns., 345. 2 Cowan, 285.

Duval, also for appellee, supported the views taken by Mr. Woodward, and urged her right to freedom.

Opinion by Justice HAWKINS:

Sibley vs. Maria, a woman of color.—Opinion of Court.

This was an action of trespass brought by the appellee, Maria, a woman of color, against Sibley, who claims her as a slave.

To sustain the action, the will of William Oliphant,, of Edgefield District, South Carolina, was introduced, the plaintiff claiming her freedom by virtue of a clause contained in it in the following words, to wit:

"Item 16th, and lastly, I give and bequeath to my nephew, William C. Hollingsworth, all the remaining part of my estate, both real and personal, including my interest in a house and lot in the city of Augusta, in the State of Georgia, after my lawful debts are paid out of it. I give and bequeath to him a life estate in my tract of land known by the name of my Turkey Creek place, and at his death that it shall descend to his legal heirs in fee simple; all the rest of my real estate I give and bequeath to him and his heirs forever, together with all my personal estate not otherwise disposed of, and *under the following conditions, to wit*: that my negro woman Maria, and her four children as his property and under his protection shall be allowed all the privileges of free persons, consistently with good order and a proper subordination, and shall be allowed out of the property demised to the said William H. Hollingsworth, two hundred and fifty dollars each, to be paid to them at such times and in such quantities as in his judgment will be most proper, otherwise to take them to the State of Ohio, and the balance of the money over and above what will be expended in their passage to be paid to them there; and in case the said William H. Hollingsworth should refuse or neglect to comply with the conditions herein expressed or should die without a legal heir, in either of these cases it is my will and desire that *all the interests, rights and emoluments which the said William H. Hollingsworth has, by virtue of this will*, shall go to John H. Hollingsworth, and shall be his to all intents and purposes as though they had been originally demised to him, &c."

Giving the will what we deem a proper construction, it appears clearly to have been the intention of Oliphant, the testator, that Wm. H. Hollingsworth should take the Turkey Creek place free from all conditions, but that he was to take all the rest of his real and personal estate, not otherwise disposed of, subject to the conditions above set forth. In other words, William H. Hollingsworth, the devisee, was to take the estate devised to him *subject to certain conditions subsequent*, which unless he performed there was a limitation over to

John H. Hollingsworth, creating what is termed a conditional limitation.

By the terms of the will Maria acquired certain rights and, upon their acquisition, the law would have lent its aid to enforce them, if not against law, policy or morality. She was a beneficiary under the will, and was entitled to the benefits of its provisions, unless they contravened some statute of the State in which the will was made, or were void for some other cause. The testator manifested unequivocally his intention as to the partial or total freedom of Maria, *firstly*, by the wish that she shall enjoy all the privileges of free persons, consistently with good order and proper subordination, and a devise to her of two hundred and fifty dollars; and *secondly*, to be taken to Ohio and, after her expenses of transportation thither were paid out of this money, the remainder of the same to be paid to her there.—Here, certainly, is created a solemn trust—a trust involving the freedom of a slave who, it is fair to suppose, had most favorably commended herself to the greatest kindness of her owner, and he, for the purpose of more effectually carrying out his benign and munificent intentions, devises the greater part of his estate, (which the witnesses tell us was a large one,) *subject to and conditioned upon this trust.*—There is no evidence to show that William H. Hollingsworth actually took the estate so devised to him. Although a devisee is not bound, *nolens volens*, to accept of a devise, yet the law will presume an acceptance, if the devise or gift is of a beneficiary character; its presumption being based upon that strong, impulsive principle of self-interest which so generally directs and governs the actions of men.—If, therefore, Hollingsworth took the estate, he took it upon the condition of the will and subject to the trust. That portion of it in which it is proided that Maria shall have the privileges of free persons, we believe, in the language of the counsel for the appellant, is void, "because it is a condition inconsistent with the gift. Such a privilege is incompatible with the relation of master and slave, and with the rights, duties and reciprocal obligations resulting therefrom." There are decisions going the other way, but in deciding this case we are governed by what we deem the laws and policy of Carolina. In that State, the slave was not permitted to go as free and exercise all the rights and privileges of free persons of color, and if he did so he became liable to be seized as a derelict and sold. This being the case, the intention of the testator as to this clause could not be

carried out, and the law of Carolina not permitting direct manumission, of course it could not be effected indirectly—the evasion of a statute being an infraction of it.

There is some diversity in the decisions how far a devise of property to a slave will entitle such slave to his freedom by necessary implication. The case of Hale *v.* Mullin, 5 Harr. & J., 590, and confirmed by the Supreme Court of the United States, 2 Peters, 670, goes to this extent, while the cases found in 2 Call, 319, 4 Dess., 266 and 1 Stewart, 320, assume the negative of this proposition. A decision of this question is not necessary, however, in this case, further than this—that if the manumission of Maria could have been *legally* effected by the laws of Carolina, the legacy to her of the money would at least have been good, so far as furnishing the means to carry the intent of the testator into execution. We have spoken of it rather as a fact indicating this intention, and as a fund to enable the party taking under it to effectuate it.

At the time of the probate of the will there seems to have been no law of South Carolina to prevent the carrying off slaves beyond the limits of the State and then to be liberated. The case of Fraser *v.* Fraser, 2 Hill Ch., 303, 35, sustains us in this view. The policy of the law against manumission was to prevent an increase of free blacks in the State, and to guard against its deleterious effects.

It is contended that there is no direct gift of freedom after the arrival of Maria in Ohio. There was certainly a trust, no precise form or set of words being necessary to create one; and taking the whole clause of the will together in relation to Maria, we think there can be but one construction of it, and that is, that the taking her to Ohio was regarded by the testator as a *dernier* means of giving her freedom. It is very true that no evidence as to the laws of Ohio was adduced in the court below; but what rational intendment, other than that of freedom can be made or adduced as to this required removal and the payment of money upon her arrival in that State?—Beside, the ordinance of 1787 embraced the territory now comprising the State of Ohio, and the decisions of the legal tribunals of that State show that its provisions were embraced in its Constitution.

Having shown that there was a clear intention of giving freedom to Maria and a trust resulting from the nature and very terms of the devise, the next question is whether that trust has been executed.

The will was admitted to probate January 7th, 1828, upwards of

eighteen years having elapsed between that time and the period of the commencement of this suit. The defendant in the court below introduced no evidence to rebut any of the presumptions raised by or under the will, and we know nothing of the time of Maria's arrival in our State, or the circumstances in which she came. All that we know is, she was held in bondage as a slave at the time of action brought. In the absence of all evidence, therefore, to the contrary, we have a legal right to presume that the trust was executed, and perfectly coincide with the Judge who tried the case in the court below, as to the principles laid down by him. We think, however, that inasmuch as William H. Hollingsworth was to take the estate by condition *subsequent*—in other words, the estate was obliged to vest in him ere he could perform the conditions—*he,* instead of the executor, was the person called upon to execute the trust. But inasmuch as the verdict was in accordance with the justice of the case, and the defendant had the full benefit of all the exceptions raised by him to the plaintiff's action in the shape of instructions asked of the court, we are not disposed to disturb the finding of the jury, who evidently acted upon the principles as declared by the court. The presumption we have spoken of is one of law, arising from the facts of the case. It is an inference drawn as to one fact from the existence of another fact, owing to a connection between them. 2 Starkie on Ev., 680.

In this case the presumption of law that the trust was executed is, however, but a *prima facie* inference or intendment, liable to be rebutted by proof to the contrary. In this case, as we have before remarked, no evidence was adduced by the defendant, showing any title whatever to Maria; and we think, owing to the presumptions arising in the case, he was called upon to defend his claim by some affirmative evidence, instead of relying entirely upon what he deemed the wakness of the cause of his adversary.

In support of the views we have taken on this subject we will cite a few authorities. "The general rule is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be inferred that he has duly performed it, unless the contrary be shown." 3 East., 192. 10 East., 216. Phil. Ev., 151. Woodward, Justice. Hartwell *v.* Root, 19 John. R., 347. So in the case of the Bank of the United States *v.* Dandridge, 12 Wheat., 64, Judge Story remarks: "By the general rules of evidence presumptions are continually made in cases

of private persons, of acts even of the most solemn nature, when those acts are the result of necessary accompaniment or other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character does his duty until the contrary is proved; it will presume that all thing are rightly done unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite, et solemnitur essee acta, donec probetur in contrarium.*"

"Fictions of law," says Mr. Justice Blackstone, "although they may startle at first, will be found on consideration to be highly beneficial and useful." They are invited, say the civilians, *"ad conciliandum equitatem, cum ratione et stabilitate juris,"* and it is a well known maxim of the common law, that in *"fictione juris, semper subsistit equitas."* Best on Pre., 24. It is a general rule that, whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, whenever such presumption can reasonably be made. 3 Sugden, V. & P., 25, 42, 43, tenth ed. Hill on Trustees, 255. See also Greenleaf, 18, 53. 2 Starkie on Evidence, 680, 681, 2—75. While the law will presume in certain cases that all things are *rite acta*, it never presumes illegality. 12 Eng. Com. Law R., 371.

As to the time within which the condition annexed to the estate devised was to be performed, there being no specific time pointed out for so doing, in such a case the law says that the condition must be performed within a reasonable time. Ross *v.* Tremain, 3 Metcalf, 495. 1 Jarman on Wills, 804. If, therefore, the condition in relation to Maria had not been performed within this reasonable period, the ulterior legatee might have claimed the estate for condition broken, subject, however, to the same condition; for the will uses this language: that if William H. Hollingsworth should refuse to comply with its conditions, then it was the will and desire of the testator *"that all the interests, rights and emoluments which the said William H. Hollingsworth was to have by virtue of the will,* should go to John H. Hollingsworth, and should be his to all intents and purposes, as though *they had been originally devised to him."* In other words, merely substituting John H. in lieu of William H. Hol-

lingsworth as the devisee of the estate bequeathed, with the conditions annexed to it.

The sustaining of this suit would not have the effect, as contended for by counsel for appellant, of infringing upon the policy of our own State, owing to our statute in relation to the manumission of slaves. If Maria had been proven to have been a slave ever since the death of Oliphant, the testator, and this suit had been primarily brought for the purpose of *establishing* her freedom, then the question involving the policy and statutes of our State would have arisen; but it cannot arise here, because the presumption is that she was free when she came here; and if she came after the passage of the law of 1829, she only rendered herself amenable to that act and that of 1832, prohibiting the coming of free persons of color to our State.

The judgment of the court below is affirmed.

Per curiam.

LUKE LOTT, PLAINTIFF IN ERROR, *vs.* BANKS MEACHAM, EXECUTOR OF JONATHAN THOMAS, DEFENDANT IN ERROR.

Writ of error to Gadsden Circuit Court.

This was an action of replevin, brought by Meacham, as executor of Thomas, in the Circuit Court of Gadsden county, against Lott, for divers slaves.

Jonathan Thomas, by his last will and testament, devised and bequeathed to Mary Thomas, during her widowhood, the slaves in controversy in this case—and in the event of her subsequent marriage, the property was given to his executors in trust, to and for her sole and separate use, and for her support during her life. Upon her death, the testator directed the property to be sold, and to be divided among his six children named in the will.

Meacham, the executor, made his final settlement of the estate in July, 1836, having before that time assented to the bequest to Mrs. Thomas, and delivered the property to her. By the final order, bearing date 16th July, 1836, he was discharged from the executor-

ship, but not from the trusts committed to him by the will. Mrs. Thomas did not marry again. She continued in possession of the property until her death, which happened in November, 1846. The persons entitled under the will, upon the death of Mrs. Thomas, took possession of the slaves, and divided them by an amicable arrangement among themselves. Lott, who had intermarried with Ann Maria Thomas, one of the daughters of the testator, was in possession of the slaves in dispute in this action, under and by virtue of the aforesaid agreement, and with the consent of all the parties entitled under the will.

The court instructed the jury, that the plaintiff, as executor of Thomas, on the death of the widow, is entitled to the possession of the property devised to her, to administer the same according to law and the directions of the will—stating, at the same time, that unless there were debts of the estate to pay, or some cause of interference by the executor, it was not disposed to allow the amicable division made by the heirs to be disturbed.

The defendant asked the following instructions: 1. That the devise and bequest in the will of the property in dispute created an estate in remainder in the persons appointed to take, after the death of Mrs. Thomas, the tenant for life, and that this estate in remainder was created at the same time with the creation of the particular or life estate.

2. That the assent of the executor to the bequest, by the delivery of the property in dispute to Mary Thomas, the tenant of the particular estate, is an assent to the remainder given to the persons named to take in remainder; and having so assented, he cannot now retract that assent.

3. That the property in dispute being in the possession of the defendant, as one of the persons entitled to take in remainder, in virtue of his marital rights, he is entitled to that possession, as against the plaintiff in this action.

4. That the plaintiff having, by his own showing, been fully discharged by the County Court of Gadsden County from all the duties of executor, on the 16th July, 1836, cannot now maintain this action.

The court refused to give the instructions prayed, and to that refusal, and to the instructions given by the judge, the defendant by his counsel excepted.

The jury found for plaintiff.

This cause was tried before the Hon. THOMAS BALTZELL, Judge of the Middle Circuit, at the Spring Term, 1848, of Gadsden Circuit Court.

Dupont and Thompson, for plaintiff in error.

Carmack, Stephens & Baker, for defendant in error.

This case not being deemed in a condition to be determined, with a just regard to the rights and interests of the parties concerned, no opinion affecting their rights and interests was delivered.

The following is the judgment of the Court, delivered by HAWKINS, Justice:

The court, after having had this case under due consideration, is of opinion that, inasmuch as its decision must depend very much upon the construction of the will of Jonathan Thomas, and as only detached portions of it are before the court, it cannot proceed and pronounce a definite opinion and decision upon it. The court is, therefore, obliged to require, that it be remanded to the Circuit Court, for the purpose of having sent hither a more perfect and complete record. Whilst making this order, without intending to indicate to parties any opinion as to the course already pursued, it cannot refrain from the expression of a regret, that the case was not, in the first instance, brought on the equity side of the court, where all the rights of the litigants could have been so fairly, and certainly far more satisfactorily adjudicated, than they can be at law.

The cause is, therefore, remanded to the court below for such proceedings as may be necessary to carry out the foregoing views and objects.

Per curiam.

HENRY D. DARDEN & WIFE *vs.* SARAH A. LINES, ET AL.

The Supreme Court of this State has no jurisdiction in a cause in Chancery, brought up by appeal from a decree, *pro forma*, entered in the court below by counsel of parties.

At a Circuit Court, held in and for the county of Gadsden, on the 16th day of November, 1848, the following decree was entered in this case: "And now, on this sixteenth day of November, came the said complainants and defendants, by their respective solicitors and counsel; and thereupon it was agreed by Counsel, that a decree *pro forma* shall be entered, sustaining the demurrer filed herein—so as not to exclude the Judge of this court from sitting in this cause in the Supreme Court on the hearing thereof.

"It is, therefore, ordered, adjudged and decreed, that the demurrer of the said Sarah A. Lines and others, defendants, to the complainants' said bill of complaint, be sustained, and the bill be dismissed, at the costs of the said complainants.

"And the said parties respectfully agreeing thereto, it is ordered that said complainants be allowed their appeal to the Supreme Court, without bond and security."

This case, and others, in which *pro forma* decrees had been entered, were submitted to the court, upon the question of jurisdiction, upon which the court were divided, and gave the following opinions:

Opinion by Chief Justice Douglas:

This and other cases have been brought up to this court, on decrees made in the court below, by consent of parties, "pro forma." The professed object of the proceeding is, to *avoid* the provision of the Constitution of this State, which disqualifies the judge who decides a case in the court below from sitting on the trial or hearing of it in this court; and in other cases to prevent the delay which would occur from the inability of some of the justices to sit in this court in consequence of their having been of counsel, or otherwise concerned in the case in the Circuit Court; and thereby to secure a trial in this court by all the justices of the Supreme Court, including, of course, the judge who, by consent of the parties, rendered the decree *"pro conforma"* in the court below. In order that this matter may be more readily and clearly understood, it is deemed proper

here to refer to that clause of the Constitution which creates this disqualification; it is as follows, to wit: "No Justice of the Supreme Court shall sit or take part in the Appellate Court, on the trial or hearing of any cause which shall have been decided by him in the Court below.' See Thompson's Digest, page 50, sec. 2, No. 4.

Another object professedly is, to avoid also the delay that would otherwise have occurred in the Circuit Court, from the disqualification of the judge to *try* a cause in which he had been employed as counsel, or attorney. The statute which creates the disability, declares that "It shall not be lawful for any judge of this State to try any cause in which he may have been employed as counsel or attorney, but shall continue the same until some judge shall hold court in the circuit in which said causes may be pending, that was not employed in such cause at the time of his election." Ibidem, 55, No. 11.

It seems to be supposed that the judge who had been thus employed may, by consent of parties, make such decree *"pro forma,"* and send the case up to this court, and that this court can take jurisdiction of it. If this can be done it is very clear that it is upon the principle that the case is *not tried* in the court below, and that this court can take jurisdiction of a case that has *not* been *thus tried;* and it has been strongly insisted that the judge who made such decree may sit and take part in the trial and hearing of the case in this court. From this statement two questions naturally arise: *First.* Can this court entertain jurisdiction of a case upon a decree thus rendered, by consent *pro forma?* and

Second. If it can, may the judge who pronounced such decree rightfully sit as judge, and take part in the trial or hearing of such case in this court?

The *first* is by far the most important question, and, indeed, seems decisive of the other; for I am free to confess that, if I entertained no doubt but that this court might rightfully take jurisdiction of a cause thus brought up, I should not hesitate were I the judge who made the decree *pro forma*, to sit and take part here in the trial and hearing of the case, upon the principle that it was not in fact tried or decided by me in the court below. But entertaining as I do a very serious doubt upon that subject, and having expressed that doubt, it is proper that I should state the reasons on which it is founded, and the views which I entertain in relation thereto.

The Constitution, art. 5, sec. 2, Ibidem, 50, No. 1, declares that "the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations, not repugnant to this Constitution, as may, from time to time, be prescribed by law." This is not one of the excepted cases, nor is the provision in regard to it repugnant to the Constitution. The same section, Ibidem, No. 5, says: "The Supreme Court shall have and exercise appellate jurisdiction in all causes brought up by appeal or writ of error from the several Circuit Courts, where the matter in controversy exceeds in amount or value fifty dollars." "An appeal is the act by which a party submits to the *decision* of a superior court a cause which has been *tried* in an inferior tribunal." 1 Bouvier's L. Dict., 82.

From the record of this case, it does not appear that there has been any trial of this cause in the court below—and if not, then it is not a proper case for an appeal.

But it is said that it has been *decided* in the court below, and, therefore, may be properly reviewed here. Has it, however, been decided. To *decide* is to *determine, to form a definite opinion; decided* means *determined, ended, concluded;* the word *decided* implies *decision,* clear, unequivocal, that puts an end to doubt. Webster's Dict., Fol. Ed., 1848, page 306. It implies in this case the exercise of judgment upon the law and the facts of the case. Judgment is the decision or sentence of the law given by a court of justice, or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury. The language of judgments, therefore, is not that it is decreed or resolved by the court, but it is *considered "consideration est per curiam,"* his debts, damages, or possessions, or the like. Ibidem, 548.

The Supreme Court of the United States, in the case *ex parte* Tobias Watkins, 3 Peters, 202, says: "A judgment of a court of competent jurisdiction in its nature concludes the subject on which it is rendered, and pronounces the law of the case; it puts an end to all enquiry respecting the fact by deciding it.'

A decree is the judgment or sentence of a Court of Equity; it is either interlocutory or *final.* The former is given on some plea or issue in the cause, which does *not decide* the main question; the latter settles the matter in dispute, and a final decree has the same ef-

fect as a judgment at law. Bouvier's Law Dict., 295, and authorities there cited.

It will hardly be seriously contended, we think, that there is any such final decree in this case, or that there has been any such *decision,* any such action of the mind of the court upon it. The proceeding on its face does not import any such thing; on the contrary, it appears very clearly intended as a device to avoid what seems to me a clear, plain and unequivocal provision of the Constitution. It is true there is a decree which, if taken by itself, apart from its context, would import finality, but then the record tells us that it was entered by consent of parties, *"pro forma,"* which means *"a mere matter of form."* Branch's Principia, page 114. Now is mere matter of form to be held conclusive? Is that the result of proceedings instituted in a court of justice, for the redress of an injury?

The decree is either final, or it is not final; if it is *not* final, then it is not properly here, for no appeal lies except on a final decree. Putnam *v.* Lewis and wife, 1 Florida Reps., 455, 464, 474, and authorities there cited; to which may be added, Gray *v.* Grundy, 2 J. J. Marshall, 134. Horsey *v.* Hopkins, Ibid., 54. Read *v.* Robb, 4 Yerger, 66. Hoyt *v.* Brooks, 10 Conn., 188. Kierk *v.* Shriver, 11 Gill & John., 405. The State *v.* Pepper, 7 Miss., 248.

If it shall be said that it is a final decree, then I answer that no appeal lies from a final decision entered by consent, *"consensus tollit errorem."* Co. Lit., 126. Webb *v.* Webb, 3 Swanst., 658. Morrell *v.* Lawrence, et al., 12 John., 521. Waller *v.* Harris, 20 Wendell, 563. Ringold's case, 1 Bland., 5, 12. Harrison *v.* Roussey, 2 Vez., 483. Toder *v.* Sansome, 7 Brown, P. C., 244. Bradish *v.* Gee, Ambler, 229. Jones and others *v.* Talliafer. Car. Law Rep., 376. 2 Smith's Chy. Pr., 50. 1 Barbour Chy. Pr., 712.

The case of Marbury *v.* Madison, 1 Cranch, 137, 1 Peters' Cond. Reps., 282, has been cited to sustain the jurisdiction in this case.—In that case, Chief Justice Marshall held that the essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.

If this be the essential criterion, (and I do not doubt it,) then the principle is conclusive upon this case; for the court below created no cause for this court to act upon, unless it committed an error in rendering the *pro forma* decree. As it did nothing else, it is very clear that there is nothing else, no other proceeding of that court for this

Court to correct; at least nothing which may not be just as well corrected in that court. It was not the action or the original causes of action to which the Chief Justice referred—no court creates them—it is the errors committed in the subordinate tribunal, upon which the appellate jurisdiction is to be exercised. If the final decree of the inferior court is, in all respects, right, there is nothing for the appellate court to correct, no case made for the action of the appellate court. It is true the appellate court may look into the record of a case which is within its jurisdiction, and has been brought according to the regulations prescribed, to ascertain whether there is any thing in it that requires correction, and if there is not, may affirm the judgment or decree of the subordinate tribunal. To warrant this, however, there must have been a *trial*, in the court below. Trial "is the *examination* before a competent tribunal, according to the laws of the land, of the facts put in issue in the cause, for the purpose of determining such issue." 2 Bouvier's Law Dict., 457.—"The *examination* of a cause in controversy between the parties, before a proper tribunal." Webster's Dict., Fol. Ed., 1848, page 1173, and it must have been properly brought up. But if it is not within its jurisdiction, or brought up according to the regulations prescribed, it cannot act upon it at all, further than to dismiss and remand it for such action to the court below as to right and justice shall appertain.

The case of Ponder *v.* Moseley, *et al.*, administrators, &c., 2 Florida Reps., 267, has been cited to show that no evil consequences can flow from the exercise of jurisdiction in these cases, because the court there held in accordance with the principles laid down in Elliot et al., *v.* Piersal et al., 1 Peters' Reps., 340, and re-asserted in 2 Peters, 369, that where a court has *jrisdiction*, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court; and according to Vourhees *v.* The Bank of the United States, 10 Peters, 474, 475, where the court says: "The line which separates *error in judgment* from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversable only by an appellate court, or may be declared a nullity collaterally when offered as evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity—in the other, mere waste paper."

But this court has *never decided* that where there was an *usurpation of power* the judgment was conclusive and could not be enquired into and declared a nullity collaterally; or, where the court had *no jurisdiction* the record of its judgment would import verity, or any thing more than *mere waste paper.* In the case of the United States *v* Stone, 14 Peters' Rep., 524, 525, a verdict was rendered in the District Court; it was then, by consent of counsel, transferred to the Circuit Court, precisely in the state in which it then was, and a division of opinion there entered, *pro forma,* to send the case to the Supreme Court of the United States, which the latter court deemed exceedingly irregular. "We are aware," said the court, "that in some cases, where the point arising is one of importance and difficulty, and it is desirable, for the purposes of justice, to obtain the opinion of this court, the judges of the Circuit Court have sometimes, by consent, certified the point to this court as upon a division of opinion, when, in truth, they both rather seriously doubted than differed about it. We do not object to a practice of this description when applied to the proper cases and on proper occasions; but this must be sanctioned by the judgment of one of the judges of this court in his circuit. A *loose practice* in this respect might render the court substantially a court for the original decision of all causes of importance, when the constitution and the laws intended to make it altogether appellate in its character; except in the few cases of original jurisdiction enumerated in the constitution."

This case has been invoked to sustain the jurisdiction of this court in the case at bar; but, when rightfully considered in reference to the Constitution of the United States and the acts of Congress conferring jurisdiction upon that court, it seems an authority against it. The case of Grant et al., *v.* Raymond, 6 Peters, 220, 221, cited for the same purpose, came before the Supreme Court of the United States in the first place, on a certificate of a division of opinion in the Circuit Court of the United States for the Southern District of New York. On inspecting the record it appeared that, at the trial of the cause in the Circuit Court, the counsel for the defendants had excepted to the decisions of the court on various matters which had been presented for its consideration, and that a bill of exceptions had been sealed by the court. A motion was made for a new trial, when the opinions of the two judges of the Circuit Court were opposed upon questions presented for the decision of the court, excepted

to on the trial, as stated in the bill of exceptions. The Cir. Court certified a division of opinion on the motion for a new trial. The question was whether the court would entertain the case as it came up from the Cir. Court on a division in that court on a motion for *a new trial.* C J. Marshall suggested that the case might be brought on if the parties would agree that it should stand as if a judgment had been given by the Circuit Court on the bill of exceptions; which was done, and an agreement in writing filed. But the court said "it would reserve its opinion and judgment in the cause till the defendants in the court below shall have sued out a writ of error in this cause to the said Circuit Court and filed a return thereto, with a bill of exceptions in the usual form, signed by the court below, in this court." So very careful was that learned court to have the cause *rectus in curia,* before it would give its opinion or pronounce its judgment upon it.

In the case of the United States *v.* Tillotson, 12 Wheat., 180, 6 Peters' Condensed Reps., 507, the court held that "Where the burthen of proof, in certain specific defences set up by the defendant, is on him, and the evidence presents contested facts, an absolute direction from the court that the matters produced and read in evidence on the part of defendant were sufficient in law to maintain the issue on his part and the jury ought to render their verdict in his favor, is erroneous, and a judgment purporting to have been given under such a charge will be reversed, although the record was made up as upon a bill of exceptions, taken at a trial before the jury upon the matter in issue, no such trial having taken place and the case having assumed that shape by the agreement of parties in order to take the opinion of the court upon certain questions of law."—All this case proves is that the Supreme Court of the United States will sometimes give its opinion upon a point of law for the satisfaction of counsel or parties upon an *assumed case,* in which, of course, no question of jurisdiction could possibly arise.

Prigg *v.* the Commonwealth of Pennsylvania, 16 Peters, 609, is the strongest case to which we have been referred in support of the jurisdiction that we are called upon in these cases to exercise; but in that case there had been a jury trial, a verdict taken and judgment rendered upon a criminal charge in a subordinate tribunal of that State. The question to be decided arose under the 25th section of the judiciary act of 1789, which confers upon the Supreme Court of the United States jurisdiction of questions such as arose in that

case. The Supreme Court of Pennsylvania affirmed *pro forma* the judgment of the court below and the case was carried up to the Supreme Court of the United States upon the single question of law presented in it, and which would have been precisely the same in any shape in which the case might have been carried up; was one which no other court was competent finally to decide, and it was appellate and not original jurisdiction which that high tribunal was called upon to exercise—it was that the errors in the proceedings of the courts of Pennsylvania might be corrected that the case was carried up. Had it been taken up before it had been investigated in a subordinate tribunal, no doubt the Supreme Court of the United States would have at once dismissed it for want of jurisdiction. And it is believed that no case can be found where the parties have been permitted to so mould and shape the proceedings in it as to bring the original matter or cause of action, and the testimony offered to sustain and rebut it, before that court for adjudication, until it had first undergone the ordeal of a subordinate tribunal, whose proceedings they were called upon to revise and correct, unless it was a case in which the original jurisdiction had been expressly conferred. Cases so moulded and shaped may have gone there, and been acted upon, but if they have, I will venture to say it was upon some point of law only, and that they passed without observation as to the manner in which they had been brought up.

It has been suggested that we have no statute or rule providing specifically the mode of taking appeals in chancery cases, and that we must, therefore, refer to the English practice. I fear, however, that their mode of proceeding in such cases is not sufficiently analagous to our own, to be a safe guide. In the case of Putnam *v.* Lewis and wife, 1 Florida, 475, where it was contended that the test of a decree's being final is that an appeal will lie upon it, this court [the Judge of the Middle Circuit delivering the opinion] said: "We have been referred to various cases of partition in the English Courts, showing appeals from decisions of the Master of the Rolls to the Lord Chancellor, in cases like the one under consideration. If their mode of proceeding was like our's, such an authority would be entitled to great respect; *but we find no such similitude or resemblance.* By our statute, which, in this respect, is the same as that prevailing in the Circuit and District Courts of the United States, a decree must be *final* before an appeal can be had. Not so in the English

courts of chancery, for there an appeal may be taken from every order or petition, motion or interlocutory decree, in the progress of the suit; and this seems to be the course in New York." Citing 3 John. Ch., 66, 68, 163, 319. 9 Vesey, 319. 14 Vesey, 184. 15 Vesey, 184, 585. 16 Vesey, 213, 218. 18 Vesey, 453.

In the case of Armstrong et al. *v.* the Treasurer of Athens County, 16 Peters, 235, 236, Mr. Justice Catron delivering the opinion of the court said: "This is a writ of error from a State Court, and it becomes the duty of this court, before proceeding to examine the merits of the controversy, to determine whether jurisdiction over it is conferred by the 25th section of the judiciary act of 1789. It is true no question upon that subject was raised at the argument presented for the appellants, (the respondent having no counsel,) but it has been the uniform practice of this court, in every case of this description, to ascertain in the first instance whether the record presented a case in which we are authorized by law to reverse the judgmnt or decree of a State court."

The same principle is asserted in Stamps, *v.* Newton, 3 Howard's Miss. Reps., 34, by the Supreme Court of Mississippi, who say, "Although the attention of this court has not been directed to the present defect by the counsel in the cause, yet we are bound to enquire in every case, whether the facts presented by the record give this tribunal jurisdiction."

In the case of Read and others *v.* Robb and others, 4 Yerger's Rep., 66, the precise question now presented to us came before the Supreme Court of Tennessee (of which Mr. Justic Catron was then Chief Justice,) by whom it was held that they had no jurisdiction of an appeal taken from a decree of a chancery court made *pro forma*: that it had jurisdiction of appeals *only* in cases where there had been a *judicial* action in the court below.

The attention of the Supreme Court of Alabama was called to this subject in 1845, in the case of Elmes *v.* Sutherland, 7 Ala. Rep., New Series, 269, in which a motion had been made to dismiss the bill for want of equity. The Chancellor refused this motion, and it was then agreed by the parties that a decree *pro forma* should be rendered for all that is alleged or prayed for in the bill, in order that the case might be taken to the Supreme Court for revision. No specific decree was rendered in the case by the Court of Chancery; it seems to have been carried up on the idea that this agreement was

to be considered as a decree. The court said: "If in point of fact a decree had been rendered by the Chancellor for the relief prayed by the bill in accordance with the agreement of the parties, it would present a question worthy of grave consideration how far this court could take cognizance of the cause under such circumstances, as it only has appellate, not original jurisdiction. It is quite possible that we might feel constrained to repudiate a case where the parties had consented to a *'pro forma* decree.

At the next term of that court, the question was directly presented in the case of Stone *et al. v.* Lewin. 8 Ala. Reps., New Series, 395 to 399. In that case the Chancellor had been of counsel in the cause, and for that reason an agreement had been made that he might enter a decree *pro forma,* either for or against the complainant, as she might elect, and the following entry appears: "This case is submitted for a decree on bill, answers and exhibits, by consent, with an agreement that a decree *pro forma* be rendered by this court in favor of the complainant, perpetuating the injunction heretofore in this case granted. It is therefore ordered, adjudged and decreed that the said injunction be, and the same is hereby rendered perpetual; and that the defendant pay the costs herein." Peck and L. Clark for the plaintiff in error; no counsel appeared for the defendant in error. Goldthwaite, Justice, delivering the opinion of the court, said: "We suggested in the recent case of Elms *v.* Sutherland, that it was questionable if this court was invested with any jurisdiction when a decree is not made by the Chancellor, but is entered *pro forma,* by consent of the parties, in oredr to have a decision here *more speedily,* or from any other cause. This case presents the matter of such a decree so fully that we must now decide the question or consider it at rest. At the formation of our State Government it was provided that "the Supreme Court, except in cases otherwise directed by the Constitution, shall have *appellate* jurisdiction *only.* This is to be co-extensive with the State under such restrictions and regulations not repugnant to this constitution, as may from time to time be prescribed by law." Const., Art. 5, sec. 2. We remark here that this provision of the constitution of Alabama is identical with that of our State, which we have above cited. "It is quite unnecessary," says that court, "to speculate upon the reasons which induced the prohibition contained in this section, as there can be no doubt it was the intention to exclude the exercise of any original ju-

risdiction by the court. As a court, our duty certainly is to give it the effect which its authors intended it should have, and this can only be done by refusing to entertain jurisdiction of cases which have not, in point of fact, been decided by the inferior courts. It is quite evident, if the consent of parties can confer what is really original jurisdiction upon this court, many cases will find their way here which otherwise might have come, and it might become common to use the inferior courts as mere offices for the preparation of causes." And this is in precise accordance with the reasoning of Chief Justice Taney, who delivered the opinion of the court in The United States *v.* Stone, 14 Peters, 525, and does appear to me to contain a plain natural and common sense view of the matter. That court, after further arguing the question, concludes its opinion by the following pertinent remarks, which appear to me to contain great force: "We have endeavored to show that this practice is in conflict with the letter and spirit of the constitution, and earnestly hope that it may be entirely eradicated, as it is frequently important to a deliberate and correct examination of the cause in this court, that it should have a careful examination in the subordinate courts. It is only when a cause is thus examined in a court of original jurisdiction, that the many mistakes of the parties can be corrected, deficiencies supplied and new views presented. If this examination is deferred until the case comes into the appellate court, there can in most cases be neither amendment nor revision of the evidence or frame of proceedings, and great injustice may result to suitors. The cause now before us (say the court) is an illustration of the evil of this practice; as no evidence was taken to sustain the bill, and the reversal of the Chancellor's decree would conclude the complainant, when, if the same deficiency had been disclosed to him, he might have exercised his discretion in permitting the party to take testimony."

Lord Eldon, who adorned the woolsack longer than any other man who ever sat in the English Chancery, was so sensible of this, that he considered it to be contrary to the duty of a court of justice, under any circumstances, to make a decree *pro forma*, in order to suffer the cause to go up. "The suitors," he said, "have a right to the deliberate attention and the deliberate judgment of the court in every stage in which, according to the constitution, the cause may proceed; and there can be no circumstances under which I would ever permit myself to say, as the cause is to go elsewhere, I give

no judgment." Lord Eldon did not consider a decree *pro forma* as a judgment of the court, but as *no judgment*. It is said, however, that the case of Le Baron and Colquitt *v.* Faunteroy and others, decided by this court, at the last term, came up on a decree *pro forma*—that we acted upon it, and that settles the question. It is true that case did come up on a decree *pro forma*, and we acted upon it; but it is equally true, that it passed *sub silentio*, so far as the question now under consideration is concerned. No question was made in that case, as to the jurisdiction. The same identical argument was presented to the Supreme Court of the United States, in the case of The United States *v.* Moore, 3 Cranch, 172, which was a criminal case. In the course of the argument, Chief Justice Marshall suggested a doubt whether the appellate jurisdiction of that court extended to criminal cases, page 188. Mason, in support of the jurisdiction, said: "This court has exercised jurisdiction in a criminal case," and cited The United States *v.* Simms, 1 Cranch, 252, when that great expounder of the Constitution, to whom the country is more indebted than to all other men beside, for the luminous and able expositions given of that great charter, which binds the thirty States of this confederacy (and it is hoped indissolubly) together, replied: "*No question* was made in that case as to the *jurisdiction;* it passed *sub silentio*, and the court does not consider itself bound by that case." This breathes the true spirit of morality and of constitutional liberty; one wrong is not to justify another; one encroachment is not to justify a subsequent breach of that sacred instrument.

It has been attempted here to weaken the force of the decision of the Supreme Court of Alabama by saying, that at one time it was construed as our's is now—that then *pro forma* decrees were common, and more approved; but that since a separate Supreme Court has been established, it is disposed to restrain the practice. But there is nothing in that case to justify the remark; it is unworthy of the reputable court of whom it was made. The language of the constitution means the same thing, whatever plan may be adopted for the organization of courts, and so I have no doubt that learned court would hold.

The reason alleged for bringing the case up in this form is, that the judge who made the *pro forma* decree shall not be disqualified from sitting or taking part on the trial or hearing of the case in this

Court, so as to secure here a full bench and prevent delay; and it has been urged upon us with great zeal and eloquence, by the learned counsel who argued this question on behalf of the appellants, that if this practice shall not be sustained, great inconvenience will result; and I feel the full force of the argument, can see the apparent evil, and should most sincerely regret that such a consequence should ensue; but if I was fully satisfied that there was no constitutional objection in the way of the exercise of this jurisdiction, I should have no doubt that the judge who made the decree could not rightfully sit on the trial or hearing of it in this court. That a case must either be decided, or not decided, appears to me as clear and strikes my mind with as much force as any problem in Euclid. If the case is decided, then it must have been decided by the judge who pronounced the decree in the court below, and the Constitution says, he "shall not sit as judge or take part in this court on the trial or hearing of it." This is a plain, clear, *constitutional prohibition*. It is said that this is for the benefit of the party, and he may waive it; but can a judge waive a constitutional prohibition? It is not for me to discuss the reasons which may have caused the insertion of this prohibition in the Constitution. I can imagine several, and one much more forcible and much more deeply seated in the very nature of man, than the mere fact that the judge, because he had decided the cause in the court below, might feel an interest in having his judgment affirmed. It is not to be presumed that the members of the Convention thought that the General Assembly would elect men to fill the high and responsible offices of judges, who possessed so little of that high disinterestedness, that noble magnanimity, which ought to characterize him who is clothed with "the judicial ermine," as to entertain a feeling so wholly inconsistent with his high position . Whatever reasons may have induced its insertion, it is sufficient for me that the people have spoken in their primary assembly; as judge, it is my duty to obey.

"The judges (said the learned judge who pronounced the dissenting opinion in the case of Gadsden *v.* Jones, administrator, 1 Florida Reps., 348,) are not to *presume* the intentions of the Legislature, but to *collect* them from the words of the law, and *they have nothing to do with the policy of* the law," citing Dwarris on Statutes, 703. Again: "Recently all the judges, and particularly the late present Lord Chief Justice, have manifested the strongest inclination to adhere more

closely in the construction of statutes to the *words* of the act of Parliament." "I have often lamented (says Lord Tenterden) that, in so many instances, the courts have departed from the plain and literal construction of statutes relative to the settlement of the poor. Where the authorities are silent, I shall hold myself forced to construe the acts of Parliament according to the plain and popular meaning of the words." 2 B. & A. Dwarris; and again, in another case, the same distinguished judge says: "The words may probably go beyond the intention; but if they do, it rests with the *Legislature to make the alteration;* the duty of the court is only to give effect to the provision." "It is safer," said Mr. Justice Ashurst, "to adopt what the Legislature has actually said, than to suppose what they mean."—Again, citing Dwarris on Statutes, 707-'8, and T. R., 52: "Without saying how far I would, in all cases and under all or any circumstances, apply these principles to the construction of acts of the Legislature, as applicable to the construction of the Constitution, that great charter of our liberties, the fundamental law of the land they have my most decided and cordial approbation, and I am not disposed to depart one jot or tittle from the rule which they prescribe in construing that important instrument, and more *especially in favor of a power to be exercised by myself.*"

The *argumentum ab inconvenienti* is never to be applied, where the sense is clear, where there is no equivocal expression, where the words used admit of only one meaning. Attorey General *v.* Duke of Marlborough, 3 Madd., 540. Deane v. Clayton, 7 Taunt, 496. Fletcher *v.* Lord Sandes, 3 Bing, 590. 13 Eng. Com. L. Reps. Broome's Legal Maxims. 85.

"In construing an act of Parliament, if the words used by the Legislature in framing any particular clause have a *necessary* meaning, it will, according to the English authorities, be the duty of the court to construe the clause accordingly, *whatever may be the inconvenience* of such a course." Turner *v.* Sheffield Railway Company. 10 M. and W., 434. Doe ex dem., Governor of Bristol Hospital *v.* Norton, 11 M. and W., 928.

"No justice of the Supreme Court shall sit as judge or take part in the appellate court on the trial or hearing of any case which shall have been decided by him in the court below." There is no equivocal expression in this clause; the words used admit of only one meaning, and most clearly exclude the judge who decided the cause

from sitting or taking part in it in this court. So that the object in view, if the case was *decided*, could not be thus attained; if it has not been decided, if there has not in fact been a final decision, a *final decree* in the case, then, as we have before shown, no appeal lies.

The case of Charles *v.* The State, 1 Florida Reports, 298, 300, was a capital case; there was a verdict of guilty, but no final judgment had been entered. The learned judge who tried the cause, entertaining a doubt as to the sufficiency of the indictment, had certified that matter to this court, pursuant to an act of the Legislature Council of the late Territorial Government; the question was, whether this court possessed jurisdiction of the case? A strong and able appeal was made on behalf of the prisoner, but, after due examination and the most mature consideration, this court held that it had not jurisdiction, and concluded its opinion in the following words: "The most prudent and safe course for a court of dernier resort, when a doubt about the power exists, is deemed to be to decline to act. The exercise of doubtful powers by a court of the last resort is always extremely dangerous, and tends to excite alarm and distrust." Such was the opinion of this court at that time, and surely, if it was right and proper then, and in a case where human life was at stake, "*a fortiori*" it is so now, when we are called upon to extend, by construction of a plain, clear and unambiguous clause of the constitution, our own powers.

In the case of Willis v. Shepherd, 2 Florida Reps., 399, this court (the same learned judge of the Middle Circuit again delivering the opinion) said "We consider it by far safer and more prudent, more in the spirit of the Constitution, and in harmony with the character of our institutions, to keep within the range and limits of a rightful jurisdiction, than to subject ourselves to the reproach of travelling beyond it, and exercising a doubtful and questionable power."

For the reasons above set forth, with the decisions of two most respectable courts of dernier resort directly upon the point, against the exercise of such jurisdiction, with no like case in favor of it, the question, it does seem to me, cannot rightly be said to be clear of doubt, and the power, I think, should not be exercised.

But if the right to exercise this jurisdiction were perfectly clear, the policy of doing it would, as this court is constituted, be exceed-

ingly questionable. It being composed of four judges, the court might be equally divided in opinion, and the result would be, that such decree, which in fact is, (and was intended by the court below and the parties to be,) but "*a mere matter of form,*" would, of course, stand, and the rights of the party against whom it was rendered be forever concluded by it, to his great and irreparable injury, and to the total subversion of every principle of justice and equity

Without, therefore, imputing aught of blame to any one for the manner in which these cases were brought up to this court, I am decidedly of opinion that they should be remanded to the courts below, from which they respectively came, for such proceedings to be had therein as to law, right and justice may appertain--not doubting but that all concerned in them, animated by those high sentiments of honor, morality and good faith, which should mark the conduct of all who are called to aid in the administration of those sublime principles, will be disposed at once, by consent and without delay, to place them in the same position which they would now have occupied, had not these *pro forma,* consent decrees been made.

Judge LANCASTER concurred fully in the foregoing opinion, and Mr. Justice HAWKINS gave his assent to the views and sentiments expressed in the last clause, as to the disposition of this and other causes brought up to this court by appeal from *pro forma* decrees.

Opinion by Justice BALTZELLS

This and other cases have been brought to this court on decrees made in the court below, by consent and *pro forma*, to avoid the constitutional objection which disqualifies the Judge who made the decision in the Circuit, from sitting on the Supreme bench, thereby securing in the case a trial by all the justices, and in other cases to prevent the delay which would arise for the want of justices to try the case in this court, owing to the inability of some of the other justices to preside, from having been counsel or otherwise concerned.

There being an equal division of the justices as to the right to entertain cases so situated, I proceed to announce the views by which I have been governed in arriving at the conclusion that the cases can rightfully and should be tried and disposed of. The objection is that the jurisdiction of this court is appellate only; that this matter not

having been decided by the Judge below, this court would be exercising original jurisdiction to give a decision of itself. It is not perceived how the conclusion is arrived at that there was no decision; there is a decree final and conclusive between the parties, and so long as it remains, no farther action can be had on the subject. It is obviously, we think, *res adjudicata*, and whether made by consent, or *pro forma*, it is yet a decree. Can it be pretended that the case is now at issue and that the parties can proceed as if it had not been made? Whether the Judge making such a decision or pronouncing such decree is competent to preside in the Supreme Court, under the clause of our Constitution declaring that "no justice of the Supreme Court shall sit as judge, take part in the appellate court, on the trial or hearing of any case which shall have been decided by him in the court below," is another question and the one more appropriately resulting from the position of the case than the question presented. (For my part, I am free to declare that I feel no difficulty or embarrassment on either question. Even in the case of the Judge having decided the case below, I see no difficulty in his presiding, with the assent of the parties, in the Supreme Court. The provision is for the benefit of parties, and such an one as, in my opinion, they may very properly waive. It is a matter, so far as private rights or interests are concerned, in which the State has no interest, and the object was to give to the party a privilege of excepting to a judge on account of the bias proceeding from a prior decision, which he did not possess; but if the party chooses to forego the privilege I see no reason why he should not be allowed to do so. A man may waive his objections to a juror, or select as arbitrators persons totally disqualified, and yet it is his own concern.) The very difficulty entertained by the counsel and court as to the mode of opening the decree, so as to leave the parties in their former position, shows that there has been a decision and that the case is not before the Circuit Court for trial. If so, where is it?

Passing, however, this view of the subject, the enquiry arises, whether it is in violation of the Constitution to try a case so situate? It is said to be so, because the jurisdiction of the court is appellate and to decide these cases is to try them originally, as if in a court of original jurisdiction. The clause in our Constitution is almost identical with that in the Constitution of the United States, and if the objection be tenable, we shall be able, by reference to the decisions of

that tribunal, always distinguished for the ability, the intimate acquaintance with and attachment of its members to the Constitution, to ascertain and solve it. No court has had the intricate subject of jurisdiction so frequently before it; being limited in its sphere of action its care has been from necessity always to keep within the range of its powers. Every foot of ground from the commencement has been contested, so that none understands the subject so well or has defined it with such precision. An appeal, then, can most safely be made to that court, as embodying the sentiment and opinions of American jurists upon this interesting question.

At an early period the court through their Chief Justice, Marshall, in the case of Marbury v. Madison, declared as "the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 1 Cond. Rep. S. C., 283.

It can hardly be contended that any of these cases have been created in this court by their institution here, or that, in case of their affirmance or reversal, the decree or sentence of the court would be carried into execution here. There has not been, nor was there, any thing to be done originally here—no testimony to be taken—no amendment of the pleadings. The cases, if tried, are to be tried upon the decree and action of the court below. This being the general rule and principle, let us see how far in practice the court has conformed to their doctrine by assuming or refusing to consider cases situate like the present.

The case of the United States v. Tillotson came up as upon a bill of exceptions taken to the opinion of the court, upon a trial before a jury upon the matters in issue, when, in reality, no trial was had, but the case assumed this shape by the agreement of the parties, in order to have the opinion of the court upon certain questions of law. "We must," say the court, "consider the case exclusively upon principles applicable to it as upon a bill of exceptions taken at a real trial."—The court took jurisdiction and reversed the case. 12 Wheat., 180

In Grant and others v. Raymond, a question was, whether the court would entertain the case as it came up from the circuit. Mr. Chief Justice Marshall suggested that the case might be brought on if the parties would agree that it should stand as if a judgment had been given by the Circuit Court on the exceptions. The case, he said, could not be heard on a difference in opinion of the judges of the

court on a motion for a new trial. The counsel having agreed that the case should stand as suggested, the court made the following order: "It is now here by the court considered and ordered that this cause shall now be heard and decided as on a writ of error brought after verdict and judgment in the Circuit Court, on the exceptions taken in that court; that the cause shall now proceed as if judgment had been actually entered in the Circuit Court for the plaintiffs there, and the certificate in the case shall be taken, regarded and treated as a writ of error sued out by defendants below, and that the question shall be whether said judgment ought to be affirmed or reversed; but that the court will reserve its opinion till the defendants shall have sued a writ of error and a return, with a bill of exceptions," &c. 6 Peters, 221.

Another case more directly in point is that of Prigg v. the State of Pennsylvania. It was a writ of error to the Supreme Court of the State of Pennsylvania, to revise a judgment of that court, as a case involving the construction of the constitution and laws of the United States. Prigg was indicted in the court of Oyer and Terminer, of York county, for forcibly taking away a negro woman, and a verdict was rendered against him. The case was removed to the Supreme Court of the State and the judgment affirmed *pro forma*, and the case was carried to the Supreme Court under the 25th section of the judiciary act of 1789. The judgment of the Supreme Court of Pennsylvania was reversed. 16 Peters, 609.

To appreciate the full force of this decision and its application to the present case it will be proper to refer to the action of the same court on cases arising under the 25th section, showing the requisites to the vesting of jurisdiction as to them. In Armstrong and others v. the Treasurer of Athens county, the court held "that to give the Supreme Court jurisdiction under that section, it must appear that a question involving the Constitution and laws of the United States was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it.' 16 Peters, 282.

At the same term the court refused jurisdiction of a case under this section, although all objection was waived, saying "consent will not give jurisdiction, and we have on several occasions said that, when the act of Congress has so carefully and cautiously restricted the jurisdiction conferred upon this court over the judgments and de-

crees of the State tribunals, it would ill become the court to exercise it in a different spirit, and it certanly could not be justified in expressing an opinion favorable or unfavorable as to the correctness of this decree, when it has not the power to *affirm or reverse it.*" Mills and others *v.* Brown, ibid., 526—7.

In the case of the United States *v.* Stone, the court it will be seen say: "We are aware that in some cases, where the point arising is one of importance and difficulty and it is desirable, for the purposes of justice to obtain the opinion of this court, the judges of the circuit have sometimes, by consent, certified the point to this court as upon a division of opinion, when, in truth, they both rather seriously doubted than differed about it. We do not object to a practice of this description when applied to proper cases and on proper occasions.—But they must be cases sanctioned by the judgment of one of the judges of this court in his circuit. A loose practice might render this court substantially a court for the original decision of all cases of importance when the constitution and laws intended to make it altogether appellate,' &c. 14 Peters, 525.

These cases very conclusively show, we think, that in the opinion of the Supreme Court at least there is no objection to the exercise of jurisdiction in a case situate like the present, and certainly under circumstances less ugent and imperious. We might well be content to rely upon this authority.

Let us examine how the matter stood under the English law, which is more immediately an authority with us, than that of the Supreme Court itself. The mode of taking appeals under our law is provided for by the rules of pratice in the courts of equity of the United States and, in case they are not applicable, by the practice of the High Court of Chancery in England. Duval, 137. In the rules adopted by the Supreme Court of the United States there is no provision for the taking of appeals, so that they and our statute also being silent, we must refer to the English practice. And here, I think, we shall find even less difficulty. According to the English practice a party had three modes of redress when aggrieved by a decree:—re-hearing before the same or another judge, appeal to the House of Lords,, and bill of review. A re-hearing by the Chancellor of an order or decree made by the Master of the Rolls, or of the Vice Chancellor, is in part an appeal and governed in general by the same rules. 3 Daniel's Prac., 1602. A case may be re-heard be-

fore the judge who heard it, or the Lord Chancellor, in which case it is generally termed an appeal although, in fact, it is only a re-hearing. 3 Daniel, 1617. A re-hearing before the Chancellor or the same judge, making the decree, opens the pleadings, and the cause is proceeded with exactly as if it were an original hearing. Ibid., 1627, 28, 29.

It is clearly not to this jurisdiction our laws can have an application as, very clearly, by the practice and general understanding, no new pleadings or proof can be adduced in the Supreme Court.

We have been referred to the case of Elmes *v.* Sutherland in the Supreme Court of Alabama, as decisive. The circumstances under which that decision was given are entitled to consideration; the Supreme Court of that State is a separate tribunal and independent of the Circuit Courts, and there may be, and undoubtedly is, a propriety in each discharging its duty as designed by the Constitution and Laws of the State; nor is it now the wish, or design to encourage on the part of the Circuit Judges of this State an evasion of duty, but to provide for the exigency in which the loss of one Judge, by having made the decision below, will incapacitate the Supreme Court for action in the case. The Judge, too, who makes the *pro forma* decision below, does not avoid responsibility, but actually assumes it, and a more responsible position in the court above. We learn that it was the practice in that State, whilst a system like our own prevailed, to admit *pro forma* decrees. The same state of things also prevailed in North Carolina previous to the establishment of a separate Supreme Court. The decision in Alabama refers to the case of Brown *v.* Higgs, 8th Vessey 566, as authority on the subject, yet we find Lord Eldon to say: "Upon conversation with persons who are practiced in courts of equity, it has been thought that in cases of this sort the court might formally affirm the judgment and suffer the cause to go to the House of Lords," &c. But he considered it contrary to the duty of a court so to act, as suitors had a right to the deliberate attention and judgment of every court in every stage in which, according to the Constitution, the cause may proceed, &c. Brown *v.* Higgs. Now the objection here is not as to the power or right of the court to make a *pro forma* decree, but to its impropriety, an objection by no means applying to the cases before us, as the parties themselves ask us to adopt this course as the better means of attaining their rights. The learned Judge spoke of the practice as being

different to his ideas of right; but suppose the necessity of the case and the certain failure and denial of justice, had been presented to him, can it be supposed that he would have hesitated, or even that the Alabama Court would have refused, under like circumstances?

But there is another view of this case in our judgment no less conclusive. Appeals from decrees in chancery are regulated by the practice of the Court of the Chancery in England, there being nothing in our laws, nor in the rules of the Supreme Court of the United States, adopted by our laws (with the single exception that the appeal shall be taken within two years,) to prescribe the mode of taking the same. From an opinion delievered by the late Judge Baldwin, exhibiting a masterly analysis of this subject, we find the appellate power (that of courts of chancery,) is an assumed one, from the necessity of the case, being neither conferred nor regulated by statute. It may and has been exercised according to the exigency of the case and time as either may call for the adoption of new rules or orders which partake more of the character of legislation than the mere regulation of the forms and modes of proceeding in the practice of the courts. 4 Bridg. Eq. Dig. 50 pl. 49. Not restrained by any act of Parliament they permit or prohibit the action of courts of equity in cases appealed from according to their discretion. Appendix 777. 9 Peters 777.

It has been supposed that the general law regulating the mode of suing out writs of error and prosecuting appeals was applicable to cases in chancery, but we do not think so; it is true the term decree is used, but this of itself would not embrace them any more than the use of the word judgment in an act regulating chancery proceedings would include cases at law; the fact is that the terms judgment and decrees are in some respects treated as synonymous by the Legislature. Independent of this, there is such a contradiction between this law and the law as to proceedings in chancery, as to forbid the construction contended for. Besides, the law allowing two years for appeals evidently showed the consideration of the Legislature that they stood on a different footing. And, indeed, under that view, if a party in chancery failed to appeal within ten days he would have been remediless.

The court has already exercised the power of making rules for the practice in the Chancery cases.

It is said, however, that the judgment to be pronounced by this

Court in these cases would not be conclusive, nor of binding efficacy. If such a result were to follow, undoubtedly the court should not hesitate to refuse the jurisdiction. But we have not apprehended any such consequence.

This court itself, in Ponder *v.* Moseley, quoting the authority of the Supreme Court of the United States in Voorhees *v.* Bank of the United States, 10 Peters, 74 says: "The line which separates error in judgment from the usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court or may be declared a nullity collaterally, where it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so." 1st Florida Reports, 267.

In the case of Parkhill's administrators *v.* the Union Bank, the jurisdiction of the Superior Court of the Territory was considered by the Supreme Court, at the January term, 1846, under the following circumstances: The Union Bank obtained a judgment against persons who had been, by the same court, at a time prior to its date, removed from the office of administrators. In reference to this removal the Sup. Court say: *"eo instanti* the letters of administration were taken from her and annulled she became as to the suit *civiliter mortuus."* Sentiments to the same effect, declared by the Sup. Court of the United States, were quoted with approbation in the following language: "By his [Savage's] removal from the office of executor, he was a completely separated from the business of the executor as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased." Again: "Could an execution have correctly issued on the judgment against the defendant? It could not have been issued against the estate in the hands of M. A. Parkhill, because there was no such character in existence," &c. The Supreme Court of the United States, in the case of Savage, also had said "the execution on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one be made by the Marshal." Florida Reps., 127—130. Howard, 282. 17 Peters, 224.—At the last term of the court, in a very elaborate opinion delivered by the Chief Justice, it was asserted as an "essential principle of natural justice that every man have an opportunity to be heard in a court of law, upon every question involving his rights or interests, before he

is affected by any judicial decision of the question." Again: "No court is authorized to render a judgment or decree against any one of his estate, until after due notice by service of process to appear and defend." Although this was a case of attachment against a steamboat, and such vessels and ships, by the maratime law, every day are held to pass by constructive notice all over the world, still the doctrine of strict notice at the common law was held applicable to them, and an act of the Legislature of the State was held unconstitutional allowing judgment and other proceedings in the first instance against the boat. Flint River S. B. C. *v.* Roberts and others. Reports 1848, p. 113.

The judgment rendered in the case of the Union Bank *v.* Parkhill's administrators came again for consideration before the court at the last term, in a suit between Ponder and Moseley, and it was then held that the Superior Court had jurisdiction to give judgment so as to bind the estate of Parkhill—that the judgment was a valid one, and that a sale under execution by the Marshal passed the right of property to the purchaser. Ponder v. Moseley and other, adm's Reports 1848, p. 267.

But this court on two occasions, at their sessions of 1847 and 1848, has given an express and direct sanction to the consideration of decrees taken *pro forma*. In Bluett *v.* Nicholson, decided in 1847, the question of jurisdiction was presented in another aspect on an application to the court to decide a question not presented by the pleadings, which was refused. 1 Florida, 384. The case of Le Baron, & Co. *v.* Fauntleroy, was a case of importance, as well for the amount involved, as the delicate and interesting questions presented; it was argued with great ability; even new proof was adduced, yet no one suggested the want of jurisdiction. Florida Rep., 1848, 293.

At the present term, in the case of Edwards *v.* Moseley, the case as presented in the court below was varied, by the introduction of new facts, yet the point of jurisdiction was not raised, although unquestionably presenting an exercise of direct original action by the appellate court.

It is said that the question of jurisdiction is a delicate one, and the old maxim is quoted that consent cannot give jurisdiction. The force of both expressions, it is conceived, is misunderstood. By the first, I understand that a court will hesitate to embrace within their jurisdicition cases, or questions, or persons not rightfully the subjects of

it—for instance, a State Court would be careful not to take cognizance of cases exclusively pertaining to the United States Courts, or other courts, or of persons subject to their jurisdiction alone. It is in this sense, the remark was used by the Supreme Court at their first term, in the first opinion ever pronounced by this court. Stewart *v.* Preston, 1 Florida Rep., 1. But the fact is, that as well this expression as the maxim itself, is more appropriate to the courts of the United States than to the State Courts; for as to the latter, the jurisdiction is always implied, being courts of general jurisdiction, and in them consent will give jurisdiction. Beatty v. Ross. Without insisting on this, the language of all courts without exception is to *amplify remedies,* and without usurping jurisdiction, to apply their rules to the advancement of substantial justice.

The principle, then, upon which our courts of law act is, to enforce the performance of contracts not injuries to society, and to administer justice to a party who can make that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case. Broom's Legal Maxims, 36.

The construction of the judiciary of the State gives facilities for the promotion of justice, by having the same judges to preside in the Circuit and Supreme Court, not possessed where these are separate tribunals. Does it not, then, become a duty so to exert the judicial power, arising from this source, as that public justice will be most effectually promoted.

For my own part, having undertaken to discharge the high public trust of administering justice, as provided by the Constitution, without sale, denial, or delay, I am not for regarding exceptions to its performance, existing rather in the letter than the spirit. I have no fear that a judgment of our's will be reversed by another tribunal, or that it will be set aside as nullity by another court. Surely with the precedents from the Supreme Court of the United States—those in this court expressly to the point—the implied jurisdiction asserted in Moseley *v.* Ponder, where judgment was given in a case where there was no defendant before the court—certainly there can be no question as to the jurisdicition. A motion has been made to withdraw the case, and send it back to the Circuit Court. To this, I cannot give my consent. In my opinion, it is rightfully here, and can only be rightfully disposed of by a decision of the case. I would as

soon consent to have any other case taken from the docket, and sent back without trial.

Justice HAWKINS concurred in the foregoing opinion delivered by Judge BALTZELL—not assenting to the view expressed in the last clause.

ROBERT MITCHELL, PLAINTIFF IN ERROR, *vs.* JOHN J. MAXWELL, DEFENDANT IN ERROR.

Whenever a power is given by a statute, every thing necessary to the effectual execution of the power is given by implication.

Writ of Error to Leon Circuit Court.

This case, and the question involved in it, are fully stated in the opinion of the court.

Randall and Thompson, for plaintiff in error.

Archer, for defendant in error.

Opinion by Chief Justice DOUGLAS.

This is a proceeding, instituted by the plaintiff against the defendant, in the Circuit Court of Leon county, to procure a decree of that court to enable the plaintiff to cause the equity or legal right of redemption in certain property of the defendant to be sold by virtue of an execution at law, pursuant to the proivsions of an act of the General Assembly of 1845, Chap. 44, Sections 1 and 2, Thompson's Digest, page 355, 356, Nos. 3 and 4. Section 1 declares that, "from and after the passage of this act, equities of redemption, or the legal right of redemption in real and perosonal property, shall be subject to levy and sale under executions upon judgments, at common law or upon decrees in equity. Sec. 2, "that, upon application made by the party causing the levy or levies contemplated by the foregoing section to be made, the courts respectively rendering such judgment or granting such decree, shall cause the mortgageor or mortgagors, mortgagee or mortgagees, and all other persons who said mortgagor

or mortgagors, mortgagee or mortgagees, or any or either of them, shall state upon oath to be interested in said mortgage property so levied upon, to come into court and answer upon oath, what amount remains due and owing upon said mortgage—what amount has been paid, and to whom and when paid, that the value of said equity or legal right of redemption may be ascertained before the same shall be sold." By the record it appears that judgment was rendered in the late Superior Court of Leon County, in favor of the plaintiff, against the said defendant, on the 15th day of November, A. D., 1842, for the sum of $2,495 99-100; and that by virtue of a *pluries* execution, issued on the 20th of July, A. D., 1847, from the said Circuit Court, the said plaintiff caused a levy to be made upon the equity of redemption, being the legal right of redemption of the said defendant, John J. Maxwell, in and to certain real and personal estate, described and mentioned in a certain deed of mortgage, bearing date on the 13th day of November, A. D., 1839, made, executed, and delivered by the said John J. Maxwell to the Union Bank of Florida, to satisfy said writ of execution.

It also appears by the record, that a citation was duly issued, pursuant to an order of the court, made on application of the plaintiff for that purpose, and was served upon the Union Bank of Florida, and that said bank, by the president, John G. Gamble, appeared and answered. After which, the plaintiff obtained an order of the court under which a citation issued, and was served upon the said defendant, John J. Maxwell, requiring him to appear and answer, according to the provisions of the statute, upon oath, but that he wholly failed to obey the said citation, and did not come into court and answer upon oath, nor, indeed, did he answer at all, so far as the record shows. In this state of the case, and without and further proceedings in regard to the said defendant, John J. Maxwell, the plaintiff moved for a decree to authorize him to cause the said equity or legal right of redemption, so levied upon as above stated, to be sold, according to the provisions and directions of the statute; which motion, after argument and due consideration, the court overruled, and required the plaintiff to pay the costs of this proceeding. Whereupon the plaintiff sued out a writ of error, and assigns the following causes, viz: "The court erred in the construction of the statute relied on by the plaintiff, and in refusing to grant the order for the sale of the equity of redemption."

The record does not show what construction the court put upon the statute to which reference is made, and we are not able, therefore, to determine whether the first error is well assigned or not.—The second, we think, in the present position of the case, cannot be sustained.

The case, as stated upon the record, seems to be a proper one for the action of the court, under the second section of the act before cited; but all the steps, necessary to lay a foundation for the motion made, and for the overruling of which this writ of error is prosecuted, do not appear to have been taken. The direction in the statute is, not that the parties shall be cited to appear, but that the court shall cause them to come into court, and answer *under oath*. The citation is, doubtless, proper in the first instance, as the first process; but if such party fails to obey the citation, when it has been duly served upon him, some other step should be taken to cause him to come into court and answer upon oath to the matters, in relation to which the statute requires that he be called to answer. The object of the statute is plainly and clearly expressed. It is that the value of said equity or legal right of redemption may be ascertained before the same shall be sold. The reason for requiring this ascertainment of the value of the equity before the sale, does not so clearly appear upon the face of the statute itself; it doubtless was, however, that persons, disposed to purchase at the sale, might know the extent of the incumbrances upon the property, and, consequently, be enabled to bid understandingly. No one else can so well tell the nature and extent of the incumbrances as the mortgagor himself, and he is by the statute made a witness for that purpose. Although it may reasonably be supposed that he would generally be the best witness, yet *all other persons*, who the said *mortgagor* or mortgagors, mortgagee or mortgagees, or either of them, shall state upon oath to be interested in said mortgaged property so levied upon, are made witnesses also. There may be and often are, in such cases, other persons, besides the mortgagee, to whom the mortgagor has given liens and perhaps secret trusts, upon the property mortgaged, which may very seriously affect the value of the equity. Indeed, the very fact that such liens and incumbrances may exist, will necessarily render cautious men unwilling to bid, and thus affect the sales. Mortgages may appear of record which have been paid—fictitious mortgages, or other apparent liens, may so appear of record in favor of

persons who never had existence, and there may be no one by whom these facts can be proven but the mortgagor himself; and he, unless required by the court to disclose the information, may choose rather to withhold it, that he may, through the medium of friends, have the property bought in for a trifle for himself, to the great detriment of his creditors. It was to prevent such things as these, we think, that the provision of the statute was enacted. He should, therefore, be required, or to use the language of the statute, the court should, upon the application of the party causing the levy or levies, &c., cause the *mortgagor* to come into court and disclose these matters *under oath*, and when he shall show that other persons are interested, they too, should be caused to come into court and answer *upon oath, as* to the nature and extent of their respective interests. Unless this shall be done, he is a bold man who would bid for such property, at such a sale. The defendants, of course, would know the value and extent of the incumbrances, and might, by the aid of others, avail themselves of that knowledge, to defraud those whom it is the duty of the court, so far as power is given it for that purpose, to protect. We are not to be understood as intimating that any such fraudulent acts in intent exists in this particular case. None such has been charged, and we are neither authorized nor inclined to presume it; but it is our duty to expound this statute, according to our view of the purpose for which it was adopted.

It has been suggested, that, the statute has not declared the mode of proceeding by which the parties, upon whom it was intended to act, be caused to come into court, it cannot be enforced; but this is too narrow a view of the question. The law is well settled that, whenever a power is given by the statute, everything necessary to the making it effectual is given by application; for the maxim is *"Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud."* 9 Bac. Abr. Ed., 1846, page 220—citing 12 Reports, 130, 131. 1 & 2 Inst., 206. Witherspoon *v.* Dunlap, 1 McCord, 546. 3 U. States Dig., 483, No. 32. 1 Kent's Comm., page 465, note a, and Field v. The people, 8 Scamm. Reps., 79, 83.

If a *subpoena* had been issued according to law in a case pending in court, in which the testimony of a witness was required, commanding him to attend in such court on a given day to testify in the cause, and had been duly served, the court, if he failed to attend and had no good reason to offer for not doing so, would, we apprehend,

be at no loss what to do, even if the statute had made no provisions on the subject. Whether, were the defendants to stand out in contempt, refuse to answer and put the court at defiance, a decree for the sale might be made without his answer, or what insuch a case ought to be done as regards the execution, it is not necessary for us to say. We will not anticipate such a state of things.

This case is not properly before us; but if it were so, we should deem it unnecessary to examine the several interesting questions arising upon the charter of the Union Bank, which were presented at the argument of this case, as they have all been presented, very fully discussed, and the opinion of the court pronounced upon them, upon the cross writs of error in the case of the Union Bank and the administrators of Samuel Parkhill, deceased, at the present term of this court.

There having been no final judgment or decree in this cause, it must be dismissed and remanded to the court below, for such proceedings to be had therein as right and justice shall appertain.

Per Curiam.

DANIEL LOVE, APPELLANT, *vs.* JAMES GIBSON, APPELLEE.

Where money sought to be recovered under a count for money paid, has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the *fact* of the judgment and the amount so recovered. For such purpose it cannot be considered as *res inter alios acta.*

Where, in a suit against one of the sureties, judgment is fairly obtained against him and no collusion existed between him and the party recovering judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given his co-surety, the latter stands virtually in privity with him against whom judgment has been obtained. The co-surety in such case is bound to avail himself of any defence he may have, and will not be permitted afterwards, in a suit for contribution brought against him by his co-surety who has paid and satisfied the judgment, to set up any defence which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defence to the action. Having failed to do so, though he

had full notice of the pendency of the action, he waives all defences he might have had; and in a suit against him for contribution by the co-surety the judgment is to be deemed *res adjudicata*.

The payment of a debt by the surety, on the fault of the principal is not deemed a voluntary, but a compulsory payment, and the action for contribution may be maintained, though no demand has been made or action brought on the original liability.

Appeal from Gadsden Circuit Court.

An action of *assumpsit* was commenced by Gibson against Love in April 1846. The plaintiff's declaration contained a special count setting forth that he and defendant were joint and several sureties for one John C. Love, on his bond as executor of John Colson, deceased, which bond was given in 1839, for $18,000, conditioned for the faithful discharge of the duties of executor by the said John C. Love. That in 1845 a suit was instituted on the bond against plaintiff for the use of the heirs of John Colson, and a judgment obtained in said suit for the penalty of the bond to be discharged by the payment of $1,792.88; all which appeared by the record of proceedings in said suit. That in April, 1846, the plaintiff paid off and fully satisfied the judgment so obtained, with the interest thereon; by reason whereof the defendant became liable to pay plaintiff the sum of $1,396.40, being the aliquot part of the principal of said judgment.

The declaration also contained a count for money paid, laid out and expended.

To the first count of this declaration the defendant demurred, and to the other pleaded *non assumpsit*. The court overruled the demurrer to the first count and gave leave to answer over.

The defendant then pleaded to said first count.

1. *Non assumpsit.*

2. That plaintiff was not compelled to pay any part of the said bond.

3. That although suit was instituted upon said bond, as alleged in plaintiff's declaration, yet the same was not regular nor legal; nor had the plaintiff in the suit on the land bond any legal right of action against Gibson, the plaintiff in this suit, as surety for John C. Love upon his bond as executor, at the time of the institution of said suit; nor did the declaration therein contain any good and valid cause of action against Gibson; but the same might have been resisted and defeated. Yet that said Gibson did not resist said action, but per-

mitted it to proceed against him, and allowed judgment to be taken without availing himself of the want of a proper cause of action, and of the absence of all legal claim and demand against him at that time as surety, as aforesaid. That therefore the plaintiff has waived, abandoned and lost all right of contribution and recourse against defendant as co-surety.

4. That though there was a suit against Gibson as surety on the bond, as alleged, yet it was wholly irregular and illegal, and might have been resisted and defeated, because the said suit was brought against Gibson, the surety before recovery had against Love, the principal. Yet said Gibson, the plaintiff in this suit, did not resist said action but failed to make defence. Wherefore he has wholly lost all right to contribution and recourse against said defendant for any part of said bond not due nor payable by said sureties by law.

5. That by the 31st section of act of the Territory, approved Nov. 20, 1828, in relation to wills, letters testamentary, &c., it was and is provided that, "whenever it shall appear satisfactory to the county court or judge, on the petition of any legatee, heir or security, that any executor who has taken out letters testamentary on the estate of any testator, is either mismanaging or wasting the estate of the deceased, it shall be lawful for the said court or judge to revoke the said letters testamentary and appoint one or more appraisers of the said estate, or to require good and sufficient security, by bond to be filed by the said executors, *for the further due administration* of said estate." That prior to the date of said bond the said Love had taken out letters testamentary on the said estate of Colson and, on petition of the heirs was required to give bond according to law, and the bond on plaintiff's declaration mentioned was given under this requirement and was intended and declared to be in pursuance of said statute, whereas said bond is not, as required by law to be, conditioned "for the further due administration" of said estate, but was attempted to be made to cover waste before the date and delivery thereof done and committed by said Love, and to make good defaults already incurred. That the bond is void for the excess beyond the security, "for the further due administration" of said estate, and plaintiff has not been compelled to pay any money as surety on account of any waste committed after the delivery of said bond, nor to make good any default since incurred.

6. That though the bond was executed and delivered and suit in-

situated thereon as alleged, yet that no valid breach of the condition of said bond was assigned in the declaration in said writ, and no legal cause of action therein set forth; and that plaintiff was then and there so advised by the defendant in this suit; and before the rendition of the judgment in said suit, the plaintiff was called upon and required by defendant to defend and resist the action by all legal ways, but that plaintiff neglected so to do, and permitted the judgment to be rendered therein, and hath since paid the amount thereof, though not legally compelled so to do. And that therefore plaintiff has lost all legal right and remedy of contribution against defendant.

7. To the second count of plaintiff declaration defendant further pleaded that plaintiff did not pay, lay out and expend $3000 as alleged.

Issue was joined on the first plea. To the second there was a demurrer assigning for cause that the matter thereof, as set forth, amounts to the "general issue" and that the plea itself is uncertain, informal and insufficient.

Replication to the third and fourth and issue tendered—that plaintiff did resist and defend an action on the bond.

Demurrer to the fifth and causes assigned: 1. That defendant by said plea seeks to raise an issue upon the legality of the bond on which judgment was had against plaintiff as surety, and in consequence of which ,having paid the same ,plaintiff here sues for contribution. 2. That by said plea defendant seeks to make an issue on the legality and propriety of the verdict of the jury in the suit on the bond. 3. That the plea is double and otherwise informal and insufficient.

To the sixth plea plaintiff replied, tendering issue, that he did not fail and neglect to make legal defences to the action, nor permit judgment therein, but did defend said suit as advised by his counsel.

Issue was joined on the seventh plea of defendant.

The defendant demurred to plaintiffs replication to the third plea, because:—1. It does not aver that in the suit on the bond there was a good and valid cause of action against said plaintiff set forth in the declaration. 2. It does not contain a full and sufficient answer to said third plea. Defendant also demurred to the replication to the fourth plea:—1. Because it does not aver that in the suit on the bond there had been a recovery against Love, the principal, before suit brought against plaintiff, the surety. 2. Because of its not being a full and sufficient answer to the fourth plea.

Demurrer to replication to the sixth plea:—1. Because it does not aver that in the suit on the bond a valid breach of the condition thereof was assigned in the declaration in said suit. 2. Because it does not traverse that he was advised and required by defendant, before judgment in said suit, to resist the same day by all legal ways. 3. Because it is not a full and sufficient answer.

The court sustained the plaintiff's demurrer to the second and fifth pleas—overruling those of defendant to plaintiff's replication to the fourth and sixth pleas, and sustaining defendant's demurrer to the replication of plaintiff to the third plea.

The plaintiff thereupon amended his replication to the third plea by inserting therein that there was a good and valid cause of action set forth in the declaration in the suit against him on the bond.

And afterwards at the Spring Term of the Circuit Court in and for the County of Gadsden, A. D., 1848, the HON. THOMAS BALTZELL presiding, the cause came on to be tried, and a verdict and judgment were given for plaintiff.

From the bill of exceptions, it appears that, on the trial of this cause in the court below, the plaintiff offered in evidence the bond of John C. Love, executor, dated 13th April, 1839, on which plaintiff and defendant were sureties. Defendant objected, on the ground that, being a statutory bond,the palintiff must show that it was required in manner and forms as enjoined by the statute, but the court admitted the bond in evidence. Plaintiff then offered the record of the suit on the bond against him, showing a judgment for $2,792 80, and a receipt showing payment and satisfaction there of by him. A record from the Probate Court, showing the amount adjudged against John C. Love, executor, by auditors appointed to settle his accounts, which was simply the report of said auditors of the 2d of Sept., 1844, and the decree of the Judge of Probate thereon, given 21st April, 1845, was next offered in evidence by plaintiff. To this defendant objected, because the record contained no evidence of liability in favor of the plaintiff in the suit on the bond sufficient to charge the sureties—because, also, the decree of the Judge did not specify the parties, entitled, and, further, because it did not appear that the executor was before the court when the accounts were settled and the decree made. The court admitted the record, after testimony of D. L. White, (to which testimony defendant likewise objected,) showing that the proceedings were had at the instance of the

executor, through a petition which cannot now be found, and that he selected the auditors. D. L. White was at that time Judge of the County Court, acting as a Court of Probate.

Here the plaintiff rested his case.

Defendant then proved that neither the heirs nor legatees of Colson applied to remove the executor, or to lay him under security. He read to the jury the record of a suit against the executor as principal on the bond, and offered in evidence a mortgage given by the executor, Love, to Gibson, the plaintiff in this suit, to secure him against loss on account of suretyship, but, on objection from plaintiff, this was ruled out.

Defendant then offered the record of proceedings in the Probate Court, showing that the executor was removed in 1839, upon the application of his co-executor, Wm. Forbes, but soon afterwards was reinstated, upon giving the bond with palintiff and defendant as sureties. The record of these proceedings were offered by defendant, to prove that the bond was unlawfully executed and under coercion, against the consent of John C. Love, and to avoid being removed from the duties of his office of executor. Objection being made by plaintiff, the court refused to admit the record.

The counsel for the defendant then moved the court to instruct the jury as follows, viz:

1. That, to enable the plaintiff to recover for contribution in this form of action against a co-surety on an executor's bond, and for the default or *devastavit* of the executor, it is incumbent on him to prove that he was compelled by suit at law or in equity, on a valid cause of action, and after all legal defences, to pay the amount on which he seeks contribution; and in such action it is competent for the defendant to allege and prove in his defence any fact tending to establish the absence of any just cause of action, or any right to recovery in the legatees, heirs, or distributees, for whose use such suit was originally instituted against his co-security.

2. That a bond taken under the law of the State, regulating the duties of executors, &c., being a statutory bond, must, to be valid, pursue the terms of the law, and if varient therefrom, forms no ground or cause of action against the sureties thereon.

3. That such a bond, so far as it enlarges the responsibility of the executor, is void for excess, as regards the responsibility of a surety, and to the extent of such excess; and that it is the duty of the plain-

tiff, seeking to recover on such a bond against a surety thereon, to prove that the breach of the condition sued on occurred within the limits of the statutory liability, or after the date of the bond.

4. That, before the jury can find for the plaintiff, on the evidence of the settlement made before the County Court on the 2d day of September, 1844, they must be satisfied from the evidence as to what amount of the liability there stated against the executor occurred after the execution of the bond, and can find for nothing more.

5. That there being no judgment recovered or decree obtained by the legatees of John Colson, upon the settlement of accounts made by the auditors, and approved by the Judge of the County Court, there is no breach of the condition of the bond of John C. Love, as executor, upon which the securities can be charged, and that by reason thereof, the plaintiff is not entitled to recover.

6. That the order of the Judge of the County Court confirming the report of the auditors, and ordering distribution of the surplus, not specifying the parties entitled, or the sums to be paid to each, does not amount to a decree for distribution and is no evidence of a liability on the part of John C. Love, as executor, to the relatives, at whose instance and for whose use the recovery was had against said James Gibson.

7. That the liability of securities on executor's bond in this case does not accrue until a judgment or decree has been recovered against him as executor, and an action on such judgment to establish a *devastavit* has been successfully prosecuted.

8. That, to fix the liability of a security on an executor's bond, for the default or *devastavit* of the executor, it is not sufficient for the plaintiff to produce evidence of a settlement by order of the Court of Probate, without the further evidence of a judgment of a court of equity or of law establishing such liability, and that it is not competent for the Court of Probate to order or decree the distribution of the surplus remaining in the hands of the executor.

9. That the order or decree of the Court of Probate, of the date of 21st April, 1845, given in evidence of this cause, not determining the names or respective interests of the heirs or distributees of said estate, did not impose such a duty or obligation on the executor as that his failure to comply therewith fixed the liability of the securities for the amount decreed to be paid by the executor in such order or decree.

10. That no order or decree can be made valid or binding by the Court of Probate for the distribution of the surplus of an estate, except it appear on the face of the proceedings that the executor had been cited to appear, at the instance of the parties interested, or had voluntarily appeared thereat.

11. That the securities on the bond are not responsible for the balances appearing in the account against John C. Love prior to the giving of the bond, if the jury believe from the evidence those balances had been previously appropriated to his use, and that the taking of the bond is evidence of a previous waste.

All which eleven instructions, or any of them, the court refused to give.

And the defendant also moved the court to give to the jury the following instructions, viz:

That the bond in this said suit, being taken for the due administration of the estate generally, while the statute of the Territory only prescribed a bond for the "further" due administration of the estate, it is the duty of the party seeking to fix the liability of a surety on such bond, to exhibit a breach of the same after the period of its execution.

That such securities are not responsible for any *devastavit* or default of the executor anterior to such date. Which last instruction the court did give, but added thereto as follows, to-wit: "That, *prima facie,* the decree of the Judge of Probate fixes the extent of liability of the executor and his securities; that it is for the defendant to show that any of the sums embraced in it, or the account alluded to by it, should not attach as a liability to the securities, as having occurred previous to the execution of the bond.

And further the court instructed the jury as follows, to-wit:

That a suit in favor of a legatee will not lie against an executor or administrator at law on the administration bond, the remedy being in equity.

That, *prima facie,* the order of the Judge of Probate, ascertaining the amount due to the legatees and ordering its payment, created an obligation on the part of the executor to pay; that, on failure to do this, his security on the administration bond might pay and claim contribution from a co-security, without requiring all the pre-requisites of a decree, a suit on the bond or *devastavit,* or other legal proceedings against the executor.

To all which rulings of the court, in admitting evidence and testimony against the objections of defendant to go to the jury, in rejecting the evidence offered by the defendant, in refusing the instructions to the jury prayed for by the defendant, and giving other instructions by the court to the jury not moved or asked for by the defendant, be by his counsel excepted.

Randall, for appellant, argued:

I. That when, as in this case, there is no express promise to pay, the liability of a co-surety for contribution depends upon the fact, whether when the money was paid there existed a *legal obligation* on the parties-surety jointly to pay. We expect to prove in this case, that neither party to this bond has yet been placed in a position to become *legally liable to pay,* at suit of these relators at law. Skillin *v.* Merrill, 16 Mass., 40—cited 2d Stark. on Ev., 101, 102.

II. No cause of action did or does exist against Daniel Love, by reason of his pretended suretyship on the alleged executor's bond; that Gibson might have resisited the bond, and that his payment of a pretended and not a real demand against Love, could not involve the latter in any new liability.

We hold the bond void—

1. Because exacted by Judge of County Court, on petition of a *co-executor,* or on his (the judge's) *mere motion,* and not on petition of "legatees, heirs, &c," against the terms of Florida statute. Act of Nov. 20th, 1828, Sec. 31, Thomp. D., 210. 1 Williams on Executors, 130, 131.

2. If court did exercise a lawful jurisdiction and power in exacting bond in this case, then we say, the bond taken was variant in terms and effect from the one prescribed by statute, and for that reason void. United States *vs.* Linn, 15 Peters, 290, 314. United States *v.* Bradley ,10 Peters, 364.

3. That if not void *"in toto"* for these reasons, that, as it extends the condition beyond the terms prescribed in statute, it is void for *the excess.*

But we contend on the above authorities, and on reason that it is void *"in toto"*—

1. It is not valid as a statutory bond.

2. Not valid as a *voluntary bond,* and good as a *common law bond.*

If to be sustained as a common law bond, then it is only suable on by the individual obligee, R. K. Call, and not *by his successors.*—Governor, &c., *v.* Twitty, 1 Dev. 153—cited 1 U. S. Digest, p. 442, sec. 207.

In any aspect, not a ground of action against *sureties*—because it contains no proper *condition,* the breath of which would justify recovery against them. Archbishop of Canterbury *v.* Tappen, 8 Barn. & Cr., 151. 15th E. C. L. R., p. 177-'8.

III. If bond be valid, no such breach of it has occurred, as rendered sureties liable to action brought at suit of these relators. That Gibson paid *too soon,* and under no "legal *compulsion.*"

Previous remedy should have been had against principal and exhausted, before resort to sureties. 8. Barn. & Cress., 151. Spottswood *v.* Danbridge, 4 Mum., 293, 296. 1 Williams' Executors, 363-'4, note. 1 Mum., 1, 12, 20. 2 Blackford, 52. 2 Mum., 24. 1 Wash. Va., 32. 1 Hen. & Mum., 11.

Thompson, for Appellee:

The parties to this controversy, James Gibson and Daniel Love, were sureties for one John C. Love, as executor of John Colson, deceased, for the due administration of said estate.

John C. Love made voluntary application to the Judge of the County Court of Gadsden, to have his accounts audited and settled. Auditors were appointed, who stated the account, showing a balance against the executor, and their report was confirmed by the court, who ordered the said John C. Love to pay over the balance so found due by him to the heirs or legatees of said estate. Upon his failure to comply with the order, separate suits were instituted against him and James Gibson, his surety—a recovery was had against Gibson, before the suit against John C. Lowe was brought to issue, and the latter was dismissed. Gibson, having paid the judgment rendered against him, brought suit in the court below against Daniel Love, his co-surety, for contribution, and having obtained judgment for one moiety of the sum so paid, Love now appeals from said judgment.

To maintain this action, the plaintiff in the court below was bound to show: 1. That defendant was co-surety with him for the principal on the bond, John C. Love.

2. That he was compelled to pay the money, and did actually pay it under such compulsion.

I.—The point first was fully proved by the production of the original bond, which on its face shows the characters in which it was executed by the respective obligors.

The introduction of this bond in evidence was objected to on various grounds: 1. It is said the bond is void because not required on the petition of a legatee, heir or security, as provided for in the 31st section of the act of 1828. Thompson's Digest, 210. That this is the only case in which a bond can be required of an executor—the spiritual court in England possessed no such power, and our County Courts do not possess it. That the requisition of the bond was evidently *ex mero motu* of the judge.

To this it may be answered, that the Probate Courts in this country possess a very general jurisdiction in regard to estates, and over executors, administrators, and guardians. A reference to the acts of our Legislature will show the express grant of powers never possessed by the Ecclesiastical Courts in England. It is by no means clear, that it is not the duty of the Probate Judge to require security of executors in every instance on the grant of letters testamentary, and such is the practice, it is said, in some parts of the State. Indeed, the section of the act referred to seems to consider it may or ought to be required. The language of the act is "whenever it shall appear satisfactorily to the said court or judges, on petition of any legatee, heir or *security*, that any executor who has taken out letters," &c. Now, if executors cannot be compelled to give security, unless they conduct themselves so as to be obnoxious to this section, how does it happen that a *security* is provided for in the enumeration of the persons or parties who have the right to complain?

It seems from other evidence, offered by the appellant from the records of Gadsden County Court, and rejected in the court below, that there were two executors of the will of Colson—that a petition was presented by Forbes, who was one of them, against Love, making sundry charges—that citation issued thereon, the parties appeared, and such proceedings had, that by an order the judge dismissed the complaint, and ordered both to give security for the due administration of the estate, by a day certain, or their letters would be revoked. On the day named an order was passed, noting the default and revoking the letters; and on the same day John C. Love applied for leave and further time to execute the bond, which was granted him. From all this it appears that the judge, from the pro-

ceedings before him, presumed from the conduct and ill feeling between the executors, that the rights of all interested in the estate were in jeopardy and required the bond for their protection. A general superintendence and jurisdiction over all matters relating to estates, testate and intestate, being given by the acts organizing the County Court, and the acts relating to wills and administration, and such an exercise of jurisdiction not being prohibited, it is not, I think, claiming too much to say, the judge was acting within the scope of his legitimate powers. This order was not appealed from, but submitted to, and the bond in question given.

If, however, there were any objection to the validity of this bond the appellant here, on being sued for contribution, cannot set it up unless he had given the appellee notice of it. Cave, use of Wallace *v.* Burns, 6 Ala. R., 781, 782. Ford *v.* Keith, 1 Mass. R., 139.

2. Another objection is, that the bond was exacted and required by duress, by threats of revocation of letters, &c., and is, therefore, void. It is not believed this can be seriously entertained, when it so clearly appears there was no duress—if the requisition of the bond was erroneous the party could have had full remedy against it by appeal, which would have suspended the execution of the order, until its adjudication in the Superior Court.

3. Another objection is that the bond is retrospective, and covers acts and defaults of the executor committed anterior to its execution. There is nothing in the bond, as the court will perceive, which indicates the intention of its framer that it should cover past defaults and such effect will not be given to its language. It is not susceptible of such construction. It is prospective in its terms, as well as effect. That it may and does cover property and moneys in his hand, unadministered at the date of the execution of the bond, is not denied; such, we contend, is its legitimate intention and effect. No *devastavit* is committed until the property or money is misapplied and wasted; and if such misconduct takes place after the bond is executed, the estate is protected by the bond from its consequences. The refusal by the executor to pay a just debt or a legacy, when there ought to be assets in his hands for that purpose, or to distribute the surplus, &c., &c., is evidence at the time of a *devastavit*. Ordinarily, it cannot well be otherwise proved. This throws upon the sureties of the executor to prove, by affirmative testimony, that an actual

waste or loss occurred at some period anterior to the date of the bond.

The Supreme Court of the United States say, in reference to a receiver's bond: "It matters not at what time the moneys had been received, if, after the appointment, they were held by the officer in trust for the United States, and so continued to be held at and after the date of the bond." 15 Peters' R., 208. From all that appeared in this case, the funds were in the hands of Love, as executor at and after the date of the bond; the first evidence of a *devastavit* is his omission to comply with the order of the judge to distribute the residuum in his hands.

The court below was evidently right in overruling this objection.

II.—As to the second point: that Gibson was compelled to pay the debt of which he now seeks contribution.

The fact of payment is not contested, but it is denied that he paid it under compulsion.

We hold it to be the law that the compulsion under which a surety acts, who pays the debt and seeks contribution from his co-surety, is not necessarily that of legal proceedings, such as a suit at law or in equity against him, perfected by judgment or decree, but may be upon a legal liability. Addison on Con., 228, 229. Lucas *v.* Curry, 2 Bailey, 403. 1 Smith's Leading Cases, 139, at top. Hamilton *v.* Cutts, 4 Mass., R., 351. Pitt *v.* Pursford, 2 M. & Welsby, 538, and American cases in note. Linn *v.* McLelland, 4 Dev. & Bat. L. R., 458. Goodall *v.* Wentworth, 20 Maine R., 324. Story on Contracts, sec. 885, 886.

If he pays without the compulsion of a suit at law or in equity, but on his mere legal liability, then, when he seeks contribution in an action against his co-surity, the *onous* would seem to rest on him of shewing such liability; and to this extent alone would the authority of Skillin *v.* Merrill, in 16 Mass. Reports, 40, cited by the other side, seem to go.

But if the surety who pays awaits a suit and defends it, and his co-surety has knowledge of such suit, or is notified of its institution and pendency, and did participate in its defence or might have done so, the co-surity is deemed and held a privy at law and is concluded by the judgment, unless he can prove it was suffered by the party by fraud and collusion with the plaintiff in the action. See 23 Smith's Leading Cases, 139, at top, citing Smith *v.* Compton, Eng. Common

Law Reps., 106. Duffield *v.* Scott, 3 T. R., 374, per Buller, Judge. See also Buford *v.* Buford, 4 Munf. R., 241. Blasdale *v.* Babcock, 1 Johns. R., 517. Kip *v.* Brigham, 6 Johns. R., 158. Cartwright *v.* Carpenter, 7 How. Miss. R., 328. Bond *v.* Ward, 1 Nott & McCords' R., 201. Burrill *v.* West, 2 N. Hampshire R., 190. Train *v.* Gold, 5 Pick. R., 386. State *v.* Colerick, 1 Ohio Cond. R., 638. 1 Greenl. E. V., sec. 116.

It appears from the sixth plea filed by appellant, that he had knowledge of the institution and pendency of the suit, and required the appellee to defend it. It appears also from the record, that the appellee did defend the suit, and paid the debt under compulsion of the judgment rendered against him.

This judgment we hold to be conclusive upon the appellant, unless he can impeach it for fraud and collusion—that it is not only evidence of recovery against Gibson, but also evidence of Gibson's liability and, consequently, of the appellant's legal liability to Gibson, for a moiety of the amount paid under it.

III.—The counsel for appellant insist, however, although no fraud or collusion is imputed by any of the pleadings, nor any question of it raised by the evidence, that the payment by Gibson, notwithstanding the judgment rendered against him ,was voluntary, inasmuch as he might have resisted and successfully defended the action brought against him, on the executor's bond of John C. Love.

1. It is alleged the County Court exceeded its jurisdiction in the order for distribution of the residuum, made on the settlement of the accounts of the executor,

For the jurisdiction of the County Courts of the late Territory of Florida, in relation to the estate of deceased persons, see Thompson's Digest, 195, sec. 1, ar. 1, and note (*e*).

2. It is alleged that the order is erroneous, in not ascertaining with precision the names of the persons entitled to the residuum, and the several proportions of each.

To this it is answered, it does not in any wise appear that the failure to pay over the surplus arose from any doubt or difficulty in this particular; if he was at any loss he should have applied to the court for its direction; but it is to be presumed, from the absence of any complaint, that the will was sufficiently explicit as to the parties and their respective interests. A similar order was held sufficient in the case of Lucas *v.* Curry, cited from 2 Bailey R., 403.

Neither does it appear that the failure to pay arose from the refusal to give a refunding bond—if one had been demanded and refused, the court would have protected the executor in his requisition. He has undoubtedly a right to have the bond before he pays over, but must refuse on the ground of its non-delivery. Chairman *v.* Mayo, 2 Hawk's R., 329.

3. It is also argued that in this case the County Court ought not to have taken jurisdiction, as there was an infant and a *feme covert* among the distributees, and the court had not power to protect their interests; they can only be protected in a court of equity.

It also appears that one was represented by guardian and the other by her husband, and no objection seems to have been made by the executor of any want of proper authority in either to receive, or any impropriety in their receiving the amounts.

The jurisdiction of our County Courts is stated in terms very similar to those employed in the constitution and laws of Mississippi, in the grant of powers to their probate courts, and there it has been held that the powers of their courts, in matters of distribution, are co-extensive with a court of equity. Carmichael *v.* Browder, 3 How. Miss. R., 252.

4. It is also contended that the order is not sufficient—that the executor should have been sued at law or in equity, and a *devastavit* fixed upon him by a regular suit, before the sureties can be called upon; and various authorities are cited, but they will be found, on examination, to refer to suits at the relation of a creditor.

Until judgment against the executor or administrator for the amount of the debt, and that he has assets to pay it, the demand of the creditor is against the estate. After a judgment of assets, &c., the executor or administrator becomes a trustee for the creditor for the application of the assets to the debt. It is then only that he assumes the character which he always bears to the legatees and next of kin, that of a fiduciary.

A recovery against an administrator is not a necessary preliminary to a suit by distributees against the sureties on the bond of such administrator. Owings *v.* Collinson, 3 Gill & Johns. R., 25. Williams *v.* Hicks, 1 Murphy's R., 437. Chairman *v.* Moore, 2 ibid., 22. Lucas *v.* Curry, 2 Bailey's R., 403.

5. It is also urged that the account taken at the instance of Love, the executor, is not binding upon his sureties.

It is certainly *prima facie* evidence of his indebtedness as against his sureties, though they were not present at the time it was taken and the amount ascertained. See Treasurer *v.* Bates, 2 Bailey's R., 362. Lucas *v.* Curry, 2 Bailey's R., 403. Heard *v.* Lodge, 20 Pick. R., 53.

But we admit the sureties might impeach it by direct proof of errors, omissions, &c.; and in this case the appellant availed himself of the opportunity—went into an examination of the accounts, called witnesses, and in this bill of exceptions admits that he failed to show any errors therein, or to establish a *devastavit* prior to the date of the bond.

IV.—As to the exception to the introduction of the Hon. D. L. White to prove the contests of the petition of Love, executor, for a settlement of his accounts, (the loss of which was proved by the testimony of Gilchrist, the present Judge of Probate,) on the ground that a record cannot be proved by parol evidence.

It is laid down that, if a record is lost, after proof of its loss, its contents may be proved, like any other document, by any secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence. 1 Greenleaf's Ev., sec. 509.—1 Phillip's Ev., 386-7, and Cowen & Hill's notes, 1067. 2 Hayw. R., 243. Arg't of Haywood. 2 Murphy's R., 255.

V.—Appellant offered to give in evidence, in the court below, a mortgage executed by John C. Love to the appellee, on real and personal estate, to indemnify him against loss by reason of his suretyship; which, on the objection of appellee was rejected; and this is also assigned for error

The appellant did not offer any proof with it that anything had been realized by the appellee from this security, or that he might have done so without reasonable diligence. It is not indemnity to defeat this action until it has been effectual as such. The case cited at bar of Knight *v.* Hughes, from 3 Carr & Payne, 467, was one where the surety, who brought his action for contribution, had received money from the common principal to be applied to the debt.

If the appellant has any claim to share the fruits of this security, he should prefer it in a court of equity; and if a proper case was made before the court, it might, by injunction, restrain the appellee from proceeding on his judgment against appellant till the security was exhausted. But alone, it cannot defeat the appellee's action, or reduce the amount of his damages.

But there is another objection to its receipt as evidence. It is, if it is to have any effect, matter in confession and avoidance, and, as such, by Reg. Gen. of January term, 1846, of the Supreme Court, should have been specially pleaded.

I have not noticed the error assigned in overruling and sustaining the demurrers to the pleadings particularly, nor have I entered into a critical examination of the various prayers for instruction refused, or of the charges given to the jury, because I feel satisfied, if I have maintained my position here assumed, they will be found to cover the whole case, and authorize an affirmance of the judgment of the court below.

VI.—Some exception was taken to the first or special count in the declaration, which, it was contended, was opened to the appellant by the demurrer to one of his special pleas.

The special count, is, I think, substantially good; but if found by the court to be defective, yet the count for money paid, laid out and expended by the plaintiff for the defendant, is sufficient without the general count. Upon this point, see Cowell, *v.* Edwards, 2 B. & P., 268. Pitt *v.* Pursford, 8 Meeson & Welsby's R., 538. Calton *v.* Simpson, 8 Ad. & Ellis' R., 136.

VII.—It was also alleged that the appellee should have shown the insolvency of John C. Love, the principal in the bond, before he could resort to the co-surety for contribution. Held not necessary in Cowell *v.* Edwards, 2 Bros. & Pul., 268. Judah *v.* Micure, 5 Blackf. R., 171. Roberts *v.* Adams, 6 Porter's R., 361. Goodall *v.* Wentworth, 20 Maine R., 324. Olin v. Greenleaf, 3 N. Hamp. R., 270.

Upon the whole case the appellant seems to have had the benefit of every defence which he was entitled to, and that substantial justice has been done between the parties by the judgment of the court below.

Archer, in reply, contended:

1. That the bond upon which Gibson was sued was not a valid bond, and no recovery ought to have been had against him. It was taken contrary to the statute. The condition of it was so framed as to act retrospectively, and not prospectively, as required by statute.

2. There was no breach of the condition. The liability of sureties upon a bond of this character is to pay upon failure of the principal, unless there be something to the contrary expressed in the con-

dition. A refusal by the principal to pay is not a breach, because *non constat* he might be compelled to pay by suit. Before the surety can be made liable, the debt must be reduced to a *personal liability* on the part of the executor, or administrator, by showing waste—by establishing a *devastavit*—by proceedings at law, in chancery, or in the courts of ordinary, if the latter have equity powers. The County Courts, or Courts of Probate in this State do not possess such powers. They, therefore, cannot, by any proceedings authorized by law, ascertain whether there has been a failure of the principal or not. This failure must be ascertained before the surety can be made liable, and this was not done in this case.

3. The relators are not shown to be the proper persons to whom payment should have been made. The suit is by legatees, and yet neither does the pretended order of the County Court show the persons entitled, nor does the will any where show that the relators are residuary legatees—and if so, what were their respective interests.

HAWKINS, Justice, delivered the opinion of the court:

This was an action of *assumpsit*, brought by Gibson against Love, for contribution of this portion of the amount paid by him (Gibson) upon a judgment recovered in favor of Colson and others, upon an executor's bond. The fact of payment is shown upon the record, and is not contradicted.

It is not the intention of the court to take up *seriatim* all the errors assigned by appellant, but it will, in a general discussion, express its views and opinions to such extent as may be requisite to a decision of the case.

That the form of the action brought (count for money paid) is proper, there can be no doubt, and it is needless to cite authorities, but we refer to 1 Stephens, N. P., 324. 2 Greenleaf Ev., 93. 6 Meeson & Welsby, 168.

It is contended that the judgment against Gibson, introduced as evidence in the court below, was not at all conclusive upon Love, and that he had a right to make the same defences as if he had been primarily and originally sued.

It certainly is a rule that a verdict or judgment does not bind any person, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. The question here arises, is the judgment against Gibson to be deemed *res adju-*

dicata and conclusive against Love, owing to the facts and circumstances of the case, as shown by evidence, or exhibited by the pleadings.

Where the money sought to be recovered under the count for money paid, has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the *fact* of the judgment and the *amount* so recovered. 1 Phillips & A. on Ev., 507. 4 T. R., 589; and where the record only seeks to show as *fact* that the *judgment was rendered,* or the *verdict given*, it can never be considered as *res inter alios acta*. 1 Greenleaf Ev., sec. 538, p. 576.

It is not, however, to be considered as evidence of *ulterior* facts embraced in it, or of those facts on which the judgment is founded, unless the party against whom the action is brought had due *notice* of its pendency, and might have defended it; in which case the record is said to be conclusive as to all the material facts contained in it. 2 Greenleaf, sec. 116. The rule in relation to notice was laid down by Butler, J., in the case of Duffield *v.* Scott, et al., 3 T. R., 374, and has been adopted by able legal writers as a cardinal principle, settling the doctrine upon this matter, vide 1 Smith's Leading Cases, 139, 2 Greenleaf, sec. 116, and has also received the sanction of decisions of courts of the highest respectability. Justice Buller remarks: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay; and *notice be given to him*, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money."

This principle is reiterated *verbatim* in the case of Smith *v.* Compton, 3 B. & Ad., 407, and is quoted as decisive authority in Kip *v.* Bingham, 6 Johnson R., 158. Swarthout *v.* Payne, 19 John., 296. 1 Wendell, 20.

The same principle is found in 4 Mass. R., 358, and in the case of Clark's executors *v.* Covington, 7 Cranch, 308, coupled with the proviso, that if the judgment is fairly and honestly obtained. In Bladsdale *v.* Babcock, 1 John. R., 517, a record having been offered in evidence, it was objected to, because the party defendant had received merely notice of the suit, and not notice also *when the cause*

was actually tried. It was ruled by the court that the first notice to defendant was sufficient, and he was bound to know all subsequent proceedings, without a special notice of the time every subsequent court was to be held.

In 13 Johnson, 226, no *actual notice* of pendency of former action was averred, but that the party was a witness in the former suit; this was deemed by Judge Spencer an averment of *a fact tantamount.* We have taken some pains to ascertain the true principle upon this subject of notice, for when correctly understood, the task becomes comparatively easy as to its application. The decisions we have quoted go to the effect to declare, that if notice in this suit has been given to Love, he stands virtually in privity with Gibson, as to the effect of the judgment rendered against Gibson, if that judgment was fairly obtained, and no collusion existed either between Gibson and the parties who recovered the judgment against him, or the principal obligor of the bond.

The defendant in his plea says: "And although true it is, that afterwards, to wit, at Spring Term, 1845, of Gadsden Superior Court, a suit was instituted against said plaintiff, as an obligor on said bond or writing obligatory, in the name of John Branch, Governor, &c., for use of John Colson and others, yet the said defendant in fact saith, that no valid breach of the condition of said writing obligatory was assigned in the declaration in said suit, and no legal cause of action therein set forth, and that the said plaintiff was then and there so advised by the said defendant, and was then and there, before the rendition of the judgment in said suit, called upon and requested by said defendant to resist the said suit by all legal ways and means, but that the said plaintiff to the contrary thereof failed, and neglected to make legal defence to said action, and permitted the judgment to be rendered therein, and hath since paid the amount thereof, though not legally compelled to pay the same."

Here is a clear admission by the defendant that he knew of the pendency of the suit, and that, too, in time sufficient to have put in pleas to the action. He says, indeed, that he advised Gibson that there *was no valid* breach of the condition of the bond assigned in the declaration, and *no legal cause* of action therein set forth; but does not this language indicate rather defects in the mode and manner of conducting the suit, than that no suit at all could be sustained? Why did he not, if he was so well aware himself of the illegality of the

bond, say so *in totidem verbis* to Gibson? But he speaks in generalities—he uses no definite language—points out no specific error, and gives no clue by which Gibson was to shape his defence.

The first case cited by us, (Duffield *v.* Scott, 3 T. R., 374,) was decided directly upon an admission in the pleadings. After Love had notice of the suit, and, as before remarked, it seems from his plea it was in time to plead, why did he not request to be permitted to join in the defence—unite in shaping the pleadings, and in fine, defend the action, although not a party to the record? What is the object of notice in these cases of co-sureties? It is to enable parties in interest to do these very things, if they should deem it requisite—and not, after the utterance of some general allegations of error, eitheir to hold aloof altogether, or to stand passively by and await the termination of the suit; and then if, perchance, on being sued for contribution, plead a defence based upon an hypothesis, saying if the party had pleaded such and such pleas, judgment would not have gone against him.

If the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defences he might otherwise have to the introduction of the instrument to be introduced in evidence, and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed *res adjudicata.*

If there was any thing to show that the judgment was not fairly obtained, the case would present a different aspect. But nothing of the sort appears upon the record. That the motives of Gibson were honest can scarcely be doubted, when he pays the whole debt, trusting to the contingencies of litigation to recover half only from a co-surety with himself. It is true, he had a mortgage, but this mortgage enured as much to the benefit of Love, after paying his portion, as to Gibson, the principle of substitution applying equally to cases between co-sureties and those between a surety and his principal.—Littledale *v.* Robinson, 2 Brock. R., 169.

The principal of contribution does not seem to have sprung from contract, but is based on a principle of justice and equity, that one person should not be singled out by the creator to pay the whole demand; and where this occurs, the law intervenes and places sureties relatively to each other in a state of equality as to the amount paid, and gives the party paying a remedy by action for contribution.

This right of action grows out of an implied agreement, that if one surety shall be compelled to pay the whole, or a disproportinate part of the debt, the other shall pay such a sum as shall render their common burden equal. On page 290 of 6th Wendell's Reports, the court remarked in relation to this subject: "The action on the money counts are resorted to as substitutes for bills in chancery, and ought to be encouraged, whenever the law affords no other remedy, and where a court of equity would compel the defendant to repay to the plaintiff a sum of money which the latter has been compelled to pay for his benefit."

It is said that there can be no recovery now, because the bond for which the original suit was brought is void, it not having been given in compliance with our statutes. In accordance with the views we have expressed, that instrument cannot be inquired into in this collateral manner; if there were objections to its illegality, they should have been brought forward in the suit against Gibson. It must be recollected that this bond is not sued upon in this case, but is introduced merely as a piece of evidence, showing the original undertaking and the liability of Love as a joint and several obligor. Nor was it necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point, (for instance, the bond,) which was controverted in the present action; it is enough if that point was essential to the finding of the former verdict. 1 Greenleaf's Ev., 572—citing 2 Saunders, 159, note, (10.) 7 Pick., 341. Peake's Cases, 219. 4 Dallas, 436. Besides, the judgments of courts of competent jurisdiction are presumed to be well founded. *"Res adjudicata pro veritate accipitur."*

We feel ourselves supported in the position last taken by the cases cited by counsel for appellee, from Massachusetts and Alabama.—Ford *v.* Keith, 1 Massachusetts, 139. Carr *v.* Burns, 6 Ala., 780. In the first case, it was decided that a surety may recover of his principal, although the money was paid for him upon a usurious contract made by the principal, and which *he* might have avoided. In the second, it was held that where one surety has been compelled by suit to pay the joint engagement, it is not competent for a co-surety, when sued for contribution, to show that the note, as between the principal debtor and payee, was without consideration.

Besides these, there are other cases showing that, although the original contract was void, or illegal, or could not have been en-

forced, if legally defended; yet, if the money sought to be recovered was paid in good faith, though technical defences were not pleaded, actions of *assumpsit* could be successfully maintained. See Firth v. Sprague, 14 Mass. R., 453. Here a party to a bond had paid on account of a breach of it by the principal, and brought *assumpsit* to recover the amount so paid. From the report of the case, it appeared that the bond was given in Turk's Island, and from the opinion of the court, it would seem that its legality was contested during the trial. The court say—"But the verdict was right, even if *there was no law authorizing the requisition of the bond* in this case. For admitting that requisition to have been wholly arbitrary on the part of the government of the Island, the surety who stepped in, in aid of the principal, has a right to indemnity, if he has been compelled to pay the penalty, without any fraud or negligence on his part." See, also, Riley and Wright *v.* Seymour, 1 Wendell, 143.—Swarthout *v.* Payne, 19 John. R., 296.

It is contended, also, that the payment by Gibson was a voluntary one, and that he was not compelled to pay.

The payment of debt by the surety, on the default of the principal, is not deemed a voluntary, but a compulsory payment. It is the legal liability that raises the presumption of a compulsory payment. Chitty on Contracts, 594. Thus, in 8 Mees. & Wels., 538, where one of two persons who, as sureties for a third, signed, together with the principal, a joint and several promissory note, on the note becoming due paid the amount although no demand was made, or action brought against him by the holder, it was held that such payment could not be deemed voluntary, and that he might sue his surety for contribution. 20 Maine Reports, 324. 3 N. H., 270. 5 Howard U. S. R., 103. Hale *v.* Smith. Judgments, too are presumed to be *in invitum. In presumptione juris, judicium redditur in invitum.*" Coke Litt., 248.

A mortgage given by John C. Love, the principal obligor, to Gibson, and dated long posterior to the giving of the bond to indemnify Gibson as to his suretyship, was offered in evidence, but was ruled out by the court. What the party intended to show by its introduction, the record does not show—if to prove payments upon it was the object, and this appeared by the record, the court would have erred in its rejection, for Gibson would have been obliged to deduct any amount paid or reimbursed him, and he could only be entitled to

contribution on the balance. Theobald on Pr. & Se., 267. But as it does not appear by the record, that it was introduced to show payment, we cannot say that the court erred in ruling it out.

Upon a review of the whole case, applying those equitable principles of which we have spoken as being appropriate in this form of action, and being of opinion that the judgment against Gibson must be considered as *res adjudicata*, we think that Love is bound in conscience and in law to pay to Gibson the amount which he has advanced for his benefit.

The judgment of the court below is affirmed.

Per curiam.

JAMES LANIER AND BENJAMIN C. WEST, APPELLANTS, *vs.* ELIZABETH CHAPPELL, AN INFANT, BY HER NEXT FRIEND, THOMAS MONROE, APPELLEE.

Where there was a contract to pay money to one, as guardian, by a company of which he was at the time a member, this was not such an union of the characters of debtor and creditor in the same person as to extinguish the debt—it merely suspended the remedy as to the guardian: though, in such case, the infant's remedy is not suspended, but he may sue by his *prochein amie*.

An infant, by her *prochein amie*, brought an action of *indebitatus assumpsit* for the work and labor of slaves. A note had been given to her guardian for the hire of the slaves, and the contract as to the time of the hire and labor was closed and executed. Held, notwithstanding the *written* contract that this form of action would lie.

Replication of *infancy* to a plea of the statute of limitations is good: and a rejoinder thereto that the infant had a guardian at the time the action accrued and long after, was held to be bad on demurrer.

Appeal from Gadsden Circuit Court.

The case was this: An action of *assumpsit* was brought by Elizabeth Chappell, a minor, by her next friend, Thomas Monroe, for the hire of certain slaves belonging to the estate of the said minor.—The declaration contained but one count in *"indebitatus assumpsit"*

for the work and labor of the said slaves. To this count the defendants who were sued as the surviving partners of a firm doing business under the name of the "Quincy Steam Saw Mill Company," pleaded—1. *Non assumpsit.* 2 Payment. 3. That defendants had delivered their promissory note in full satisfaction of the plaintiff's demand. 4. The statute of limitations.

On the plea of *non assumpsit* issue was joined by plaintiff. To the plea of payment plaintiff replied a denial, and issue was taken thereon.

To the plea of satisfaction by the delivery of defendant's promissory note, the plaintiff replied specially that the note fell due before the commencement of this action and never was paid, and that plaintiff was the legal holder thereof at that time. Upon which allegations issue was joined.

To the plea of the statute of limitations plaintiff replied "infancy." To this last replication defendants rejoined that plaintiff had a guardian. And to this rejoinder plaintiff demurred. The demurrer was sustained by the court and the defendants compelled to take issue.

Defendant's counsel prayed the court to instruct the jury "That, if they believed from the evidence that the contract upon which this suit was brought was made by Lanier as the lawful guardian of Elizabeth Chappell, with the Quincy Steam Saw Mill Company, of which he was at the time a member, that the right to receive and the duty to pay united in the same person, and the debt became thereby extinguished."

The court refused to give the instruction and the jury found for the plaintiff.

The counsel for appellants assign the following errors:

1. The court erred in sustaining the demurrer to the rejoinder to the replication of "infancy."

2. In refusing to give the instruction asked by the defendants below.

Carmack, Stephens & Baker, for Appellants:

The record in this case presents the following questions:

1. Can this suit under the proof be maintained in the name of Elizabeth Chappell by her next friend, Thomas Monroe?

Elizabeth Chappell appears to be an infant, and the question occurs whether the contract upon which this suit is brought was made *with her?*

The proof in the case shows that the only contract made was with Lanier, the former guardian of Elizabeth Chappell. If this be so, it follows that no other person than Lanier can sue upon the contract. If Lanier declines to sue, then the present guardian may sue in the name of Lanier for the use of the present guardian. The case of Moseley, Ex'r, &c., *v.* Williams, Florida Reports, 304, is in point.

2. No contract was made with the *plaintiff*. The contract was made by all the defendants *with Lanier*, at that time the guardian of Elizabeth Chappell, the plaintiff. He had the legal right to hire out the property of his ward, and to make such contract for that purpose as he chose. The right of the guardian must be exclusive.—If the ward may repudiate the contract thus made by the guardian for her benefit, then she can only elect to charge the guardian on his official bond with the true value of the hire.

The ward cannot repudiate the contract made, and set up another and different contract never made in fact. The defendants clearly made but one contract, and that was *in writing* with Lanier. The guardian and the other defendant cannot be bound by *another*.

They are bound by the real contract made, and the same can be enforced in a court of equity, if not in a court of law. This court cannot make contracts for parties, and therefore cannot treat as a nullity the contract made with the guardian and *imply* a contract made with a different person.

3. The court erred in sustaining the demurrer to the rejoinder.—The replication is "infancy." The rejoinder states that the infant, at the time the contract upon which suit is brought became due, had a lawful guardian, capable of suing upon the contract.

The replication is bad, because the action of *assumpsit* is not included in the saving clause of the statute of limitations in favor of infants. Thompson's Dig., 443, part 2.

4. The court erred in refusing to give the instructions asked for by defendant's attorneys.

Dupont and *Thompson* for Appellee:

The only point raised by the instruction prayed in the bill of exceptions is that "where the right to receive and the duty to pay unite in the same person, the debt becomes thereby extinguished," &c.—Whether the doctrine contended for in the prayer be true or not, it

is not material to enquire in this place. It will be sufficient for us to show that it is not applicable to the circumstances of this case, as developed by the evidence.

The evidence proves that James Lanier, one of the defendants, as guardian of the plaintiff, hired to the firm of which he was a member the negro slaves, compensation for whose services it is the object of this suit to recover. Now the doctrine above contended for will be found to be inapplicable in this, that "the duty to pay" was incurred by *the copartnership firm* of which James Lanier was a member, and not by him in his individual character. Indeed, he never took upon himself, in his individual character, "the duty to pay, nor could he have been made *liable* "to pay," but in virtue of his character *as a copartner* of the Quincy Steam Saw Mill Company. As to the "right to receive," this was also in his special and qualified character as guardian; and the duration of this "right to receive" was cotemporaneous only with the existence of his office as guardian. It is perfectly manifest, then that James Lanier who had incurred "the duty to pay," was a different *character* from the James Lanier whose right it was to receive this demand. If the doctrine contended for by the appellants be at all applicable to his case, it is so only to the extent of the *"remedy"* as presenting a *technical difficulty* in the maintainance of an action at law upon this demand by *James Lanier;* but certainly it does not operate to the extent contended for in the instruction prayed, to wit: to "the extinguishment of the debt."—Vide Bradford *v.* Williams, 4 Howard S. C. R., 587.

But supposing that, according to the technicality of legal proceedings, James Lanier in his *two characters* be considered as *one and the same person,* then we contend that "the right to receive" must be considered with reference to the date of the legal demand, to wit:—the *time of the institution of the suit;* at which period it is very evident from the testimony that James Lanier had no "right to receive" the demand, he having been previously dismissed from the guardianship of the plaintiff. Vide Richards *v.* Richards, 22 Eng. Comm. Law Rep., 119.

That the doctrine contended for is laid down too broadly in the instruction prayed will be made manifest by adverting to the very common case of a firm executing its note payable to one of its own members, or the stronger and not infrequent case of an *individual* drawing a note payable to *himself.* In these instances, it is true,

that the technical difficulty of maintaining an action at law exists so long as "the right to receive" and "the duty to pay" unite in the same person; and to this extent the *"remedy"* is affected. But it will not be seriously contended, that in the former case *"the debt was extinguished,"* or in the latter that the note was absolutely *"void;"*—the utmost that can be contended for in these instances is that the debts are *inchoate,* and only requiring *an assignment* to impart to them full life and vigor.

In the instance just cited no action at law could be maintained so long as "the right to receive payment" remained in the payees of the note; but the moment that "the right to receive," passed out of the payees by assignment, and vested in a third party, the *technical difficulty* is removed and the action is maintainable; which conclusively demonstrates the correctness of our position that it is the *remedy* only, and not the *debt,* which is affected by the union of the character of creditor and debtor in the same person. Vide Chitty on Bills, 52. Ibid., 27, note b. 5 Cowen R., 711. 22 English Common Law Reports, 119.

The reasoning in the foregoing cases is much stronger when applied to the circumstances of the case at bar. It may be true that so long as James Lanier, one of the firm of the Quincy Steam Saw Mill Company, retained his office as guardian, *he* could not avail himself of the *legal remedy* to enforce the payment of this demand in favor of his ward, but the moment that his character as *creditor* was terminated by his dismissal from the guardianship, "the right to receive" vested in some other person and the technical difficulty was immediately removed. In order to show the strength of the argument as applied to the circumstances of this case, we contend that "the right to receive," or in other words the *remedy* was not *exclusively* with the guardian—the infant ward might, by leave of the court, have sued for this demand by *"prochien amie,"* notwithstanding the existence of the guardianship; and we venture nothing in asserting that the court will never hesitate to grant its concurrence for the protection of the right of the ward, whenever it is made to appear that the guardian is derelict of his duty. 4 Iredell Eq., 117, 121. Vide 1 Black. Com. 386, margin 465. Thompson's Digest, page 326, paragraph 5.

It will be noted, in this connection, that this suit was prosecuted by *"prochien amie,"* and that the plaintiff counted upon the *original*

consideration, and not upon the promissory note which was given to secure the payment for the hire of the slaves. The promissory note was introduced in evidence for two purposes, to wit: 1. to establish the value of the services of the slaves and 2, to sustain the replication that the note was still *unpaid* and in the possession of the plaintiff. Vide Chitty on Con., 593 to 599 and notes.

The propositions deducible from the foregoing argument and upon which we rely for an affirmance of the judgment are as follows:

I.—That the union of debtor and creditor in the same person, will operate an extinguishment of the debt *only* when that union has been effected *by the act of the original parties to the contract;* but that when that union is produced by *operation of law,* it does not *extinguish the debt,* but only *suspends the remedy* for the time being.—2 Williams on Ex'rs, 940. 1 Salk. R., 306—Wankford *v.* Wankford, by Holt, C. J.

II.—That in case of a guardian becoming a debtor to the estate of his ward, not even the *remedy is suspended,* for the minor may sue by *"prochien amie,"* notwithstanding the existence of the guardianship. 1 Black. Com., 386, margin 465. Thompson's Digest, 326, paragraph 5.

But should the court be against us on these propositions, then we assume,

III.—That the point of law embraced in the instruction prayed and refused was not raised under any issue made by the pleadings, and, as an abstract or hypothetical question, the judge was not required to declare the law in reference thereto.

1. The point was not raised by the pleadings. Vide, Rules of Practice for the Circuit Courts, page 10, par. 3.

2. As a hypothetical question the judge was not required to declare the law in reference thereto. 1 Crauch, S. C. Reps., 309—Hamilton *v.* Russell.

From the nature of the evidence incorporated in the bill of exceptions, it is anticipated that an effort may be made to relieve the defendants from the obligations resulting from the general law governing "copartnerships," by an attempt to distinguish the company of which these defendants were members, from an ordinary trading company. Should this effort be made we then assume the following positions, viz:

1. That the "Quincy Steam Saw Mill Company" was a *trading*

company within the limits of its ostensible objects, to-wit: *the sawing and vending of lumber.* Vide Collier on Part., 657, citing 1 Swanst. 495—Crawshay v. Maule, Ibid., 518. 1 Jac. & Walk., 208—Jeffreys *v.* Smith.

In the authority above cited a mining company was held to come within the definition of a trading association, and we can perceive no good reason why the same character may not attach to a steam saw mill company.

2. That as to the power of each member of the company to bind the company by contracts, (even should this association be viewed as a joint stock company) the general law of partnership must prevail, there being in this case no deed of settlement, limiting the authority of the individual members of the company. Collier on Partnership 645, 652, 661.

3. As to the power of an individual partner to bind the firm, the general rule is, "that the act or agreement of one partner, with reference to and in the course of the partnership business and affairs, and the management thereof, is, in point of law the act or contract of the whole firm and binding on them, *although it violate some private agreement between the parties.*" Chitty on Contracts, 200, 201. 4 Cowen Rep., 282—Reynolds *v.* Cleveland.

In the case at bar the subject of contract was the hiring of laborers to carry on and conduct the ostensible business of the company.

As to the saving in the statute of limitations see 15 Viner Abr., 104.

HAWKINS, Justice, delivered the opinion of the court:

Elizabeth Chappell, an infant, &c., brought an action of *indebitatus assumpsit* in the court below, against James Lanier and Benjamin C. West, the appellants. The declaration charges them as surviving partners of a concern, trading and doing business under the name, style and firm of the Quincy Steam Saw Mill Company, for the work and labor of the servants and slaves of the plaintiff done, performed and bestowed by them in and about the business of the defendants, at their special instance and request. The following note was attached to the declaration:

"On the first day of January next, we promise to pay James Lanier, guardian of Elizabeth Chappell, minor heir of Benjamin Chap-

pell, deceased ,three hundred and thirty-five dollars, for the hire of two negro boys, named Edward and Henry.

JAMES LANIER,
Treasurer Steam Saw Mill Company.

January 1, 1841.

To this declaration the defendants in the court below pleaded—1. Payment. 2. That they delivered the plaintiff, before the commencement of the action, a promissory note for the amount sued for, signed by James Lanier, Treasurer Steam Saw Mill Company, and payable to James Lanier, guardian of Elizabeth Chappell, and that the same was taken in full satisfaction and discharge of the several promises in the declaration mentioned, and of all damages by the plaintiff sustained, by reason of the non-performance of the same, and was accepted of and from the defendants in full satisfaction and discharge of the promises and damages.

3. The statute of limitations.

To the first plea the plaintiff replied non-payment and tender of issue.

To the second plea, that the note at the time of the commencement of the action was and still is wholly due and unpaid, and that plaintiff is the holder thereof.

To the third plea, of the statute of limitations, the plaintiff replies *infancy*.

In the consideration of the case, we will, in the first place, notice the instruction asked for by the appellant, and refused by the court below, to-wit: "That if the jury shall believe from the evidence, that the contract upon which this suit is brought was made by James Lanier, as the lawful guardian of Elizabeth Chappell, with the Quincy Steam Saw Mill Company, of which he was at the time a member—that the right to receive and the duty to pay united in the same person, and the debt became thereby extinguished."

We cannot think that the court erred in declining to give this instruction. In such a case, we do not regard the debt extinguished, but merely the remedy, so far as respects the guardian, suspended. Of course, as long as the fiduciary character of Lanier existed, an action could not be brought upon the note, for the reasons assigned by the counsel for the appellee but to say that the debt itself became extinguished, owing to this temporary and fortuitous union of

payee and promisor, would be, we think, as little in consonance with justice as the rules of law.

As soon as Lanier ceased to be the guardian of Elizabeth Chappell, this peculiar character of Lanier, to wit, the right to receive and the duty to pay, underwent a radical change, and the duty to pay only remained. The books draw a clear and visible distinction between the acts of a *party* and the acts of *law*. For instance, where the debtor was appointed executor—this at common law was deemed a suspension of the remedy by the *voluntary act of the creditor*, and, therefore, the action was gone, but the effect was different, where the remedy was suspended by the *act of the law*. "Thus, if administration of the effects of a creditor be committed to the debtor, this, being by act of law, is only a temporary privation of the remedy.—Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the *administrator de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor." 2 Williams on Executors, 940. So, in the Commentaries on Equity, vol. 2, page 454, Judge Story remarks: "At law, a testator, by the appointment of his debtor to be his executor, extinguishes his debt, and it cannot be revived; although a debt due by an administrator would only be suspended. The reason of the difference is, that the one is the act of the law, and the other is the act of the party." 1 Atkins, 461—Hudson *v.* Hudson.

The note in this case was a valid one, and given upon a good and meritorious consideration, to wit, the services of the slaves of the plaintiff in and about the business of the defendants, and though the forms of legal proceedings precluded her for awhile from suing upon it, there is no reason, when these technical objections have ceased to exist, that it should not at least be considered as evidence of a contract.

There was here no *voluntary act of the party*, by which she was to be indefinitely bound. She had no option, no discretion to exercise, for all that was vested in the guardian; and inasmuch as he, by the *act of law*, could not sue, the remedy was suspended, until a new and different state of affairs arose.

Before closing this part of the subject, we will refer to the case of Richards *v.* Richards, 2 Barn. & Ad., 447, cited by counsel for appellee. In this case, a married woman being administratrix, received a sum of money in that character, and lent the same to her

husband, and took in return for it, the joint and several promissory note of her husband and two other persons, payable to her, with interest. It was held that, although she could not have maintained any action upon the note during the life time of the husband, yet, that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might bring an action upon it against either of the other makers, at any time within six years after the death of her husband, and recover interest from the date of the note. The case, also, of Bradford *v.* Williams, 4 Howard S. C. R., 587, can be quoted as having a bearing upon the case at bar.

The present suit, however, is not upon the note itself, and the party had a right to bring *indebitatus assumpsit*, though there was a special contract. "Though it is a rule that when there was an *express* contract the plaintiff cannot resort to an *implied* one, yet he may, in many cases recover on the *common counts*, though there was a *special agreement*, provided it has been executed or completely performed." -1 Chitty Plead., 372, 7th Amer. Ed. So *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed. 7 Cranch, 299. 9 Pet., 541. If the case be such, that, supposing *there had been no special contract*, a party could recover for money paid, or for work and labor done, then *indebitatus assumpsit* will lie. Cook *v.* Munston, 1 New Reports, 355. 4 Cowen Rep., 288. 1 Cowen, 378. 1 Archibald N. P., 63, 64. 2 Starkie on Ev., 92. B. & P., 129.

It is admitted in the bill of exceptions, that the services were performed by the servants of the plaintiff, and this is evidence sufficient to support the general count; for the consideration was executed and nothing remained to be done, except the payment of the consideration money on the part of the defendants. To enforce this payment, this action is brought, and we think correctly so.

The note was brought into court, ready at any time to be cancelled on motion, and ceased to be operative as a promissory note. It was introduced to rebut the plea of payment, and to account for it as plaintiff was bound to do, ere he could recover upon the common counts, and as a piece of evidence, shewing the value of the services of the negroes. We regard it as legitimate evidence for that intent, and its effect was to be judged of by the jury.

It is admitted on the record and proven by evidence, that Lanier and West were partners, and after that fact is established, the act or declaration of either, relating to the subject-matter of partnership, is evidence as to the other. 2 Starkie on Ev., 44-5—1074. Gow. on Part., 63.

There is nothing upon the record to show that Lanier had not authority to bind the firm by his written admissions, or that there was any fraud practiced by Lanier in making these admissions. There is no new contract attempted to be set up by the plaintiff, and virtually it is the same as the written one. In any event there was a legal obligation on the part of the appellants to pay, arising from the consideration received, and to enforce this obligation, this suit is properly brought.

We do not think the court erred in sustaining the demurrer of the appellee to the appellant's rejoinder to the replication to the plea of the statute of limitations. We do not conceive that the plea of the statute of limitations is to operate against plaintiff, on account of the facts set forth in the rejoinder, viz: that Lanier was guardian at the time of the accruing of the action, and continued to act as such guardian, long after said action accrued to him. The remedy was suspended, as to action upon the note, so long as his character of guardian remained; but beside that, the suit is not brought upon the note—he certainly was not guardian at the time of bringing the action.

Although an infant *may* sue by *prochien amie* it is not a consequence that he must do so necessarily to save the statute. The right to sue and the privilege of availing himself of the statute are not incompatible. The law gives both. Besides, to say, that inasmuch as the infant could at any time sue, and not having sued therefore the statute cannot avail him, independent of depriving him of a positive right, it strikes us as a doctrine replete with the rankest injustice to a class of persons, whose interests the courts will go far to protect. Look at the results to grow out of such a doctrine. Suppose the guardian through negligence or dishonesty will not sue, or as in this case, could not sue, then, after the lapse of five years the debt would be barred according to this view. Such a doctrine we cannot countenance. In the case cited from Saunders, "It was said that the infant should have waited until his full age, because the six years had elapsed during his infancy, and therefore he could only

pursue his action according to the words of the saving clause of the statute, which is in six years (English act) after his full age, but this was not regarded by the court; and it seems to Saunders, that he may well pursue his action at any time within age, although the six years are elapsed. See for this case the case of *non clarius in finis*, 2 Inst. 519, Cotton's case." 182 Ballantine on Limitations. Our statute of limitations as to its proviso, or saving clause preventing its operation, is almost *verbatim* similar to that of 21 Jac. 1, c. 16, the only real difference between them being that our statute leaves out the clause *"actions upon the case for words."*

The same point taken here, that the word *"trespass"* in the saving clause of the statute did not embrace actions of assumpsit or upon the case, has been repeatedly decided that they were so embraced, as being within the equity of the statute.

In Chandler vs. Villet, Sid. 453, it was expressly adjudicated. An infant by his guardian brought action upon the case upon *assumpsit;* the defendant pleaded statute of limitations, and plaintiff demurred, and the question was upon this proviso, which saves to infants actions of trespass, &c., and it was urged that trespass upon the case is not mentioned in this saving. But the court were of opinion, that this saving extends to actions upon the case (as no doubt it was intended) for there is a saving of trespass generally, and all actions upon the case are trespasses (scilicet) trespass upon the case, and it shall be mischievous, if other construction shall be made." Same point also decided in 242, sec. 15, Viner, Ab. 104.

The case of Shandler *v.* Villet is reported at large in 2 Saunders' Rep. 120. where there is a citation of the case of Crosier *v.* Tomlinson, 2 Moad. Rep. 71. In the latter case the court said "that upon the whole frame of the act it was strong against the defendant, for it would be strange that the plaintiff might bring an action of debt and not of *indebitatus assumpsit.* Where the scope of the act appears to be in a general sense, the law looks to the meaning, and it is to be extended to particular cases within the same reason, and therefore they were of opinion, that actions of trespass mentioned in the statute are comprehensive of this action because it is a trespass upon the case, and the words of the proviso save the infant's right in actions of trespass." Fitz. 81, Ballantine on Limitations, 83, 185-6-7.

The judgment of the court below is affirmed.

Per curiam.

DOUGLAS, Ch. Justice, remarked:

That Judge Lancaster and himself, in order that their views, in regard to the first proposition discussed in the opinion pronounced in this case, may not be misapprehended or misunderstood, deem it proper to say that they have reconsidered the doctrine of extinguishment as laid down by Judge Lancaster in the opinion delivered by him at the last term of this court, in the case of Williams *v.* Moseley, 2 Florida Reps. 351 to 357, and find no cause to doubt its correctness, and therefore adhere to it; but that they do not consider the principles there asserted, as at all applicable to the facts of this case, which are very clearly, they think, distinguishable from those presented in the case of Williams v. Moseley. We have no doubt, continued the Chief Justice, of the plaintiff's right to recover in this case upon the second ground assumed. And indeed, we can see no good reason why she might not have maintained an action of *indebitatus assumpsit* at any time after the first of January A. D. 1842. On that day it appears that there was three hundred and thirty-five dollars due from the Quincy Steam Saw Mill Company for the hire of her two negroes. The contract was then fully executed. The authorities cited abundantly shew that, in such a case, *indebitatus assumpsit* will lie. And in Thomas *v.* Dyke 11 Vermont Reps. 273 it was held that "an infant may sue by *prochien amie* notwithstanding he has a guardian, if the guardian does not dissent;" and in Isaac *v.* Boyd, 5 Porter's Reps. 388, it was said that a *prochien amie* is one admitted by the court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. The court may control him as well as a guardian *ad litem,* and should permit or direct what is most for the interest of the infant." Longnecker vs. Greenwade, 6 Dana Reps. 516, 2 United States Digest 162, No. 111-163, Nos. 131, 142. The trust of a *prochien amie* (it is said, 10 Petersdorf 579) was first created by statute, though by long practice it may now be considered as one of the rights of an infant, and was intended to provide for those cases where the lawful guardian omitted to protect the rights and interests of his ward or was *unable* or unwilling to commence a suit in his behalf. 5 Porters' R., 394.

JOHN S. SHEPARD, PLAINTIFF IN ERROR, *vs.* WILLIAM KELLY, DEFENDANT IN ERROR.

The act of December 11th, 1824 in relation to the foreclosure of mortgages by proceedings in the courts of law, requires *personal* service of notice of the intention of the party to institute his suit. If a party acknowledges service of notice, or appears and pleas or confesses judgment, it is sufficient under this statute to give jurisdiction of the person of the defendant.

An agreement by a defendant, under his hand and seal to confess judgment is not a power of attorney to confess judgment and is not within the prohibition of the statute.

A decree or judgment of foreclosure need not contain any more specific description of the property than a reference to the deeds of mortgage filed with the petition, which specially set forth the property mortgaged.

A judgment or decree of foreclosure under the statute should not award execution against the specific property mortgaged. The law requires that execution shall issue thereon as in other cases.

The following statement of this case was made by the court before proceeding to announce its decision:

This was an action at law brought by Kelly for the foreclosure of two mortgages, which he held to secure to him payment of a debt or liability due to him from Shepard, the plaintiff in this court and defendant below, or at the time of making said mortgages, to become due, and be paid in two instalments as in the said mortgages expressed: one of said mortgages purporting and expressed to be cumulative to the other as security for the same debt or liability for the consideration of an abatement or remission of twenty per cent. of the liability for which the original mortgage was given. The petition sets forth that, when the first instalment on said mortgages became due and payable, the plaintiff instituted suit and obtained a judgment for principal and interest of said first instalment, and decree for foreclosure of all right and equity of redemption of or in the said mortgaged property—and in this suit he alleges the second and last instalment to be due, and prays judgment for that and a foreclosure of the equity of redemption in the mortgaged property mentioned in the said two mortgages.

Upon the petition filed in the court below by the said Kelly the plaintiff in that court, the following endorsement is made:

"In Leon Circuit Court. I, John S. Shepard, Mortgagor, defendant in this petition, do hereby acknowledge due and legal service of notice of intention of petitioner to institute this suit, consenting that said petition shall be filed as of the first day of the Spring Term, 1847, of Leon Circuit Court, and do hereby under my hand and seal confess judgment ,and agree that decree of foreclosure be rendered at said Spring Term, 1847, of Leon Circuit Court, with a stay of execution till the first day of February A. D., 1848, eighteen hundred and forty-eight.

"Witness my hand and seal.

(Signed) "JOHN S. SHEPARD, Seal."

Upon this state of case the court, under and by authority of the act to authorize the foreclosure of mortgages in the courts of common law of Dec. 11th, 1824, Duval's laws, p. 38, gave judgment at law for the plaintiff, Kelly, for the sum of $9066.40, his principal and interest, and also for his costs, to be taxed by the clerk of the court, and also adjudged, ordered and decreed a foreclosure of the equity of redemption, against the defendant Shepard, mortgagor, and all persons claiming or to claim by, through, or under him of or in the mortgaged premises, in the said deeds of mortgage in said petition set forth and therewith exhibited, and that execution issue according to the statute in such case made and provided, with stay of execution until after the first day of February, 1848, according to the agreement to confess judgment. The following entry also appears in the record preceding the trial, judgment and decree above mentioned:

"Principal sum,	$7,727,06 1-4
"Interest from 1st Feby. 1845 "to May 1847, 2 y. 2 M. at "8 per c.,	1,339,34
"Due 1 May 1847, second instalment, Princ. and Int.	$9066,40.

"The above calculation I believe to be correct.

(Signed) "JOHN S. SHEPARD."

On 6th April, 1848, a motion was made to amend the decree entered in this case at the Spring Term, 1847, by inserting a particular description of the mortgaged property therein instead of the reference to the petition and mortgage, which motion was granted, and on the

7th day of the same month in open court an amended decree in said suit was made and placed of record *nunc pro tunc,* in which the mortgaged premises are specified. Upon which said proceedings, petition, consent and agreement of said defendant Shepard, final judgment, decree of foreclosure and amended decree, the defendant Shepard obtained a writ of error returnable before this court, and assigns his errors as follows:

First. The agreement to confess judgment is void under the statute.

Second. There is error in giving one foreclosure on two mortgages.

Third. There is error in the original judgment, because the property foreclosed is not mentioned.

Fourth. There is error in the judgment as amended, because it awards execution against the specific property only.

Fifth. The judgment is incomplete.

Sixth. It does not appear by the amended judgment how much of the original entry is meant to be retained, nor how much is meant to be abandoned.

Seventh. The judgment as it now stands is irregularly entered, and inconsistent in its several parts.

Eighth. The court had no jurisdiction under our statute to render judgment for the debt and foreclosure of the mortgage, because it appears from the petition that said mortgages had been foreclosed at a former term of the court, so that when this suit was instituted no mortgage existed to be foreclosed.

Archer, for plaintiff in error.

The judgment is entitled as by confession. This is error. The alleged confession, endorsed on the petition, was made before the petition was filed, and before suit instituted. This is proved by the endorsement of filing by the clerk, which is made in pursuance of the agreement, as a thing *previous to the filing.* A confession before suit is void under the statute, and the court erred in acting upon it as valid. The waiver or acknowledgement of notice is simultaneous with the alleged confession, but if it were prior in time, the suit cannot be said to have been instituted before the court by such notice, for the notice under the statute is not by judicial writ, but only by

writing prepared and signed by the plaintiff, and is a notice not of suit *instituted,* but of an intention to institute a suit in future.—This intention is carried out only by the filing of a *petition* according to the statute, and by such filing the court is *first advised* of the suit. From this latter date, therefore, the suit may be said to commence.

The agreement endorsed cannot conclude the plaintiff in error, so as to operate as a confession of judgment, or as a "general release of errors"—at all events, not as a "general release of errors," for these are the words of the statute. But if this agreement is no "general release of errors," then it can neither be a judgment by confession, or by agreement or consent—for there can be no such thing as a judgment by confession or consent, which is not "a release of errors." No appeal lies (where the court has jurisdiction) from a judgment by confession or consent, and, consequently, if the plaintiff's judgment is affirmed, on the ground that it is proper confession of judgment, and, consequently, a release of errors, then that is done which the statute prohibits, viz: the defendant is concluded from assigning errors in this court, by reason of an agreement made before suit. It is against the policy of the statute, that a defendant, before suit instituted, and before he has the benefit of advice of counsel, should be forestalled in his defence by injudicial consents, confessions, or releases.

2. The judgment is on two mortgages, which in the foreclosure are treated as *one.* Each mortgage is a separate security, and should be so recognized in the judgment, as well as petition. The decree should be in equity for the sale of the property first mortgaged—and if that was insufficient, of sufficient of the property last mortgaged to make up the deficiency. This is necessary to preserve regularity. Under the *statute,* I cannot understand how two mortgages can be foreclosed in one proceeding. A second mortgagee, holding a subsequent lien on the property in Kelly's second mortgage, would be entitled to redeem the property in second mortgage, by paying so much of Kelly's claim as the property in the first mortgage failed to pay. How could such subsequent mortgagee redeem, if the foreclosure were amalgamated, without being required to pay the whole debt, and discharge the property in the first mortgage? The irregularity in this respect is apparent, and can only be cured by separate proceedings on each mortgage, and as this cannot be done under

the statutes without giving two judgments for the same debt, it would follow that the foreclosure of one of the mortgages should have been had in equity. See the concluding paragraph of opinion of the Chief Justice, in the case of Parkhill's administrators *v.* Union Bank.

These objections apply to both the original and amended judgments. There is an additional objection to the original judgment, for which the judge in the court below quashed the execution in the first instance, and which gave rise to the amended judgment, viz: that the foreclosure does not name the property foreclosed, but refers to a paper, not part of the decree, for a specification of the property. This was clearly fatal. A judgment, to be regular and certain, should contain on its face, and not by reference, all the requisites of a judgment. For example, a judgment in favor of the heirs of A. B., would be invalid and erroneous, although it might be easily ascertained who were the parties entitled as such heirs. So a judgment "for the sum mentioned in the note appended to the declaration," would be erroneous for want of certainty.

There are also objections to the amended judgment:

1. It awards execution against the mortgaged property, and that alone, which is contrary to the statute, there being no "other cases" in which such execution is awarded or issued. Besides, this mode absolutely requires the sheriff to seize *all* the property, more than twice sufficient in value to pay the debt. But for the judgment authorizing it, such seizure would be a trespass, and certainly that judgment is erroneous which seeks to justify a trespass. Again: this process is an infringement of a *right* secured by statute to every defendant in execution, viz: the right to substitute other property in lieu of that levied on. Such substitution cannot be permitted under the process required by the judgment, because such process does not authorize the sale of any *other* than the mortgaged property.

2. The amended judgment is irregular—it is incomplete—it is but the conclusion of a judgment, and not only bad on that account, but it does not define how much of the original entry is retained, and how much repealed. Where is the point of junction, at which a union of the two entries takes place, is left uncertain. The judgment should have been entered as an amended judgment, *complete*, and entered *nunc pro tunc* in lieu of the original. For this defect, there is an uncertainty, which is fatal. The first requisite of a judgment is certainly, for by it the rights of the parties are finally settled.

Thompson for defendant in error.

I.—It is alleged by the plaintiff in error, among other positions, that the court below had no jurisdiction of this cause, for the reason, as he contends, that the plaintiff had no existing mortgage to secure his debt when he filed his petition.

The counsel for the plaintiff in error and myself differ very widely on this point, for I contend that there was not only a valid and subsisting mortgage, but the question of *"jurisdiction,"* as I understand the meaning of the term, does not arise in the cause.

1. As to the question of jurisdiction. This is truly said to be the power to hear and determine a cause. Now, whether the instrument sued upon is or is not a mortgage, is a question to be decided by the court when the parties come before it, upon the pleadings and proofs, and whether it decides affirmatively or negatively, it is the exercise of jurisdiction. So the very position assumed by counsel here could not have been maintained by the court below, if it had been urged there, except by the exercise of jurisdiction. 9 Bac. Abr. 245, tit. *"statute,"* is cited to the point, that if a new remedy be given by statute in a particular case, this shall not be extended to alter the common law *in any other case.* I admit the principle, but deny its application to the case at bar. I do not contend that the statute of 1824, authorizing the foreclosure of mortgages by the courts of common law, alters the common law in any other case than that of mortgages; but in this respect I do contend, that it alters the common law in divers particulars, as will be hereafter shown. Nor do I consider the citations from the sup. U. S. Digest in anywise more favorable to the plaintiff in error, so far as I have been enabled to examine the Reports from which the notes are extracted. This is not a *summary* proceeding, nor does it profess to be, nor is it, in fact, so *"stringent"* a remedy as it is argued to be. The object of the statute evidently is to unite the powers of the law and equity courts in the application of a remedy—and while it would avoid multiplicity of suits, it favors the mortgagor, by greatly restricting, if not entirely abolishing, the old common law doctrine of *foreclosure,* which, in many instances, would bear rigorously upon the mortgagor. Instead of ordering the property to be delivered up to the mortgagee, and cutting off forever the power to redeem, it provides for a sale of the property under execution as in other cases, extending, *ex debito.* the privilege of redemption up to the time of sale, and giving him the

advantage of a sale, and the surplus, if any remained after the payment of the debt. By the common law, too, the mortgagee, after he obtained possession, and barred the redemption by his decree of foreclosure, might bring an action at law, and recover on his debt, whatever he could establish to the satisfaction of a jury the mortgaged premises were insufficient to satisfy. All this difficulty, and the vexation of the defence of a subsequent suit is avoided, by the equitable provision of a public sale to determine the value, and by a judgment rendered with the statute foreclosure for the mortgage debt.

The act under discussion is a *remedial* statute, and such construction ought to be put upon it as will tend to suppress the mischiefs intended to be remedied. 9 Bacon Abr. 257, tit. *Statute.*

The court is well aware of what the law was before the act—a comparison of this with the provisions of the act, will show clearly the intent of the Legislature, and the end to be attained by its enactment.

The case cited from 3 Humph. R. 313, arose under statute of Tennessee, which gave a summary and stringent remedy against a constable *and his sureties,* for a failure to pay over moneys collected, on a few days' notice to the *constable* only. Under this statute, a judgment was rendered against A. B., constable, and two other persons, not describing or averring them to be sureties, or to have had any notice of the proceeding. The Supreme Court very properly and justly reversed the order, the court below having no jurisdiction of the persons, by notice to them in fact, or constructively, *qua* securities. The two cases from 8 Porter R. pp. 99, 104, arose under a special statute of Alabama, which allowed the State Bank to recover of its debtors by motion, on ten days' notice, and in both these cases it did not appear that the parties were notified. The very summary, and I may add, penal character of these acts, authorized and demanded a most literal construction, and the decisions were doubtless right, but it is respectfully submited that they have no application to the case at bar. Assuming, then, that the counsel are in error in supposing the question of jurisdiction arises in the present case, I now proceed to discuss the other branch of his proposition, upon which he supposes the question to arise.

2. Is there a subsisting mortgage to be foreclosed? It is not denied that there was a large mortgage debt to be paid by instalments; but it is alleged that the mortgage, having been proceeded upon to

recover the first instalment due, cannot now be enforced for the recovery of the other and remaining instalment.

The argument of the learned counsel in this court, it seems to me, is based upon an erroneous apprehension of the meaning of the term *foreclosure* in the act of 1824. Foreclosure, at common law, means the shutting out or exclusion of the equity of redemption of a mortgage—but this meaning is consistent with the provisons of the statute. A mortgage being held by the strict rules of the ancient common law to be a sale and conveyance of the thing mortgaged, upon condition—when the condition was broken, the estate became absolute in the mortgagee, and the mortgagor could not force the mortgagee to allow redemption, except in a court of equity; and if the mortgagee desired to cut off and debar him of his right, he might do so by his suit in equity, and, when decree of foreclosure passed, all right and all equity of redemption was forever gone. These strict common law doctrines have been departed from in most of the States of the Union—some by legislative interposition, and some by the action of the courts. The common law is believed to prevail with the most strictness in the New England States, Does *foreclosure* by our statute have any such effect? Certainly not; for although a *formal* decree of foreclosure is directed by the court, yet it is in fact but *nominal*. Execution is to issue upon the judgment for the debt rendered, with the decree of foreclosure, *as in other cases*. Until a sale actually takes place, the property, possession and legal right of redemption is not barred. If the mortgagor pay the execution to the sheriff, he defeats the foreclosure, and he has a *legal* right to pay. If the sheriff, by direction of the mortgagee, should refuse to accept the payment, a legal tender would be of equal force to defeat and vacate the decree of foreclosure. That the common law in this respect is altered cannot be denied. Even under the common law as it prevails in the New England States, payment and acceptance of the debt, or even a part of it, opens the foreclosure. 8 Vermont R., 164, 6 N. Hamp., 12, 5 Pickering R., 418, 4 Greenleaf, R., 495—showing that there the act of the parties may defeat a foreclosure.

Now, in the case at bar, if the decree had been rendered conformably to the ancient law, for a foreclosure of the first instalment, and the mortgagor had subsequently paid it, and the payment had been accepted, would it not defeat the foreclosure here, and open

and vacate the decree? But it was rendered under the statute—in which the judgment for the debt and the decree must be co-existent, and are dependent upon each other. The statute is imperative, that the mortgagor must set forth and show in his petition the amount actually due he must prove it by the production of his evidence of debt, and further verify it by affidavit—the court awards judgment for the debt thus shown to be actually due—the decree of foreclosure is, in effect, but a direction that the mortgaged property is the primary fund for its discharge, and execution by the statute is awarded as in other cases. In New York, there is a statute providing that the court may, in bills to foreclose, direct the sale of the whole property where part of the debt only is due. and apply the proceeds to the whole debt, with a rebate of interest for such part as is not due; and under this act the courts have held that they will so decree only in cases where the mortgaged property is incapable of division. 2 Johns. Ch., 486, 487. 4 Johns. Ch., 534. 5 Paige, 38. We have no statute upon the subject. Indeed, our statute of 1824, for the foreclosure of mortgages, does not provide for any order of sale; it directs execution to issue as in other cases. and which authorizes the officer executing to sell only so much of the property as will satisfy the debt. In New York, there is provision by law for a summary foreclosure and sale by advertisement; and, under this act, it has been held, in the case of a mortgage payable by instalments, if the whole mortgaged property is foreclosed and sold to satisfy the first instalment, subject, however, to the lien of the future instalments. the property is, in the hands of the purchaser in equity, the primary fund for the payment of the future instalments. Cox v. Wheeler, 7 Paige's Cr. R., 248.

In Alabama, where the power to foreclose mortgages is yet confined to the equity courts, they have held, that on the first default, a decree of foreclosure shall be rendered, and a sale ordered to satisfy the sum due, and other sales ordered as the future instalments fall due, until the debt is paid, or the property exhausted; and so in Maryland. But these are chancery courts, and the property is sold by order of the court, and it is the duty of the court to prescribe to its officer the mode in which the decrees are to be executed. In Florida, it is sold under executions as in other cases, and the general law directs the officer in the execution of the process.

If the counsel for the plaintiff in error are right in giving to the

foreclosure, under the statute, the force and effect of a common law *foreclosure,* then it would seem that the estate of Mr. Kelly, the mortgagee, is absolute at law and in equity, and he has the right to the immediate possession, with a demand for rents, issues and profits, since the date of the decree. If I am right, Mr. Shepard, the mortgagor, is still the owner of the mortgaged property, subject to the lien or incumbrance of the second instalment of the debt, which is now due, and the property may, by the statute, be applied to the satisfaction of the execution issued on the judgment.

The court will observe, that this question was not presented in the court below—that the judgment and decree was rendered by the consent and agreement of the party, and no opportunity was afforded of showing the vacation of the former decree, if, in law and under our statute, such a decree for the recovery of the first instalment, would bar and preclude the recovery of the remaining sum secured by the same instrument. It is not pretended that any portion of the mortgaged property has been executed or in any wise applied to the satisfaction of the former decree; but the claim to revise this, rests on the simple ground, that you have proceeded to recover the first moiety of your mortgage debt, and that proceeding concludes and debars you from the recovery of the remaining moiety, although the property on which it is secured remains untouched.

If there is anything in this objection, it is of the most technical character I have ever heard urged in a court of justice, and I have yet to learn that a court will give a strict and technical construction to a statute, which is remedial in its whole effect, to defeat a just claim. The defendant in error is entitled to every just and reasonable intendment, and, if necessary to support the judgment, the court will construe the consent and agreement endorsed on the petition, as a vacation of the former decree and judgment by the act of the parties.

II.—But this decree and judgment has been rendered by consent and agreement of the parties, endorsed upon the petition, and will the court go behind it for the purpose of reversing the judgment upon purely technical grounds? Various objections have been presented to this *consent* and *agreement*, and I will proceed to notice them.

1. It is said, the *consent* cannot give jurisdiction. This I have already noticed in my argument to show that the question of jurisdiction does not arise in the case.

2. By referring to the *"consent,"* which is incorporated into the record, the court will have no difficulty in seeing that its object was the ease and favor of the present plaintiff in error. Its effect is—1. To acknowledge that he had received due notice of the institution of the suit, which is a waiver of the four months' notice which he is entitled to by the statute. 2. To agree that the petition to foreclosure should be filed that day as duly filed, which is a waiver of the filing four months before that day. Both these provisions of the statute are for the benefit and advantage of the mortgagor, and to enable him to have time for his defence, if he has any to make. Surely, a party at any time may waive a right or privilege which he has in law. Can it be denied? But it is said he waived the notice; he did not waive the filing. Look at the consent: it "confesses judgment and agrees that decree of foreclosure may be entered at the same spring term, 1847," at which it is to be filed. He is to be presumed to know the law, and to know also when he is asked to consent, it is because the other party cannot enforce the act to be done. But is it without a surrender of some right on the part of the petitioner? Is it without a consideration? Clearly not. The petitioner, on his part, consents that execution of such judgment and decree shall be stayed till the first day of February, 1848. The whole arrangement shows it to have been the result of mutual agreement and concession. The transaction occurred at the spring term of the Circuit Court which was held in April and May, 1847. If this arrangement had not been made, the mortgagor had not consented to waive the requisition of notice and filing petition four months previous to the term, why, the mortgagee, it is presumed, would have given the notice and filed his petition in time to have had his judgment at the fall term of 1847, which occurred in the month of November; ten days after the judgment, his execution would have issued as a matter of course; and by the first of December, he would have been prepared to execute his judgment. Now, by the consent rule, he stayed his execution till the first day of February, 1848, thus giving to the defendant, the mortgagor, till the first Monday of March, the sale day, to pay off the execution, and thereby satisfy the judgment and vacate the decree of foreclosure. There is no pretence of a defence upon the merits, and the whole agreement shows that the defendant surrenders no actual right thereby, but it was, in fact, a favorable arrangement for him.

But it is said the agreement to confess judgment, or the confession included within the consent, is bad, for two other seasons: 1. It does not state in whose favor the judgment is to be confessed: 2. There is no sum mentioned for which judgment is confessed. It will be recollected that this consent, agreement, or confession, is endorsed upon the petition, which fully states the plaintiff's name, the amount claimed, and all other facts of the case. The consent being endorsed upon it, is to be held, taken, and construed as a part of the consent or confession, and is incorporated in it, and, therefore, complies substantially with the requisition, and shows the objections are not well founded.

The learned counsel, in conclusion, abandoning his design of restricting the consideration of this consent rule, according to its very letter, and without reference to the petition on which it is endorsed, next endeavors, by enlarging its meaning, to bring it within the objection of the statute against powers of attorney to confess judgment, and general releases of error before the suit brought. And the process is this: It is a confession of judgment—a confession of judgment bars a writ of error; therefore, it is a general release of error. The writing which but a few paragraphs before could not, by any possibility, be available as a confession, is now, by force of argument, transformed from a confession of judgment into a general release of error, and so obnoxious to the statute. The position is very forcibly illustrated by the story of the quack doctor, who undertook to cure an attack of fever, by turning it into fits—here, finding his argument not conclusive to himself, he changes his attack, and proposes by argument to turn it into a "general release of error," and then, says he, I can kill it by force of statute. The last effort, I trust, will be as futile as the others.

It is void, say the counsel, because the consent was made before suit brought. Now, as to time, if that be material to the validity, the testimony of the record is, that it was a simultaneous and concurrent act with the commencement of the suit, and was not before it.

III.—Another ground assigned for error is, that an agreement to confess judgment is void under the statute, and Thomp. Digest, 350, is cited. On reference to the statute, it will be found to be directed against powers of attorney, and general releases of error. It does not apply to the case at bar.

IV. Another ground assigned is, that there is error in giving one

foreclosure on two mortgages. It appears from the record, that after the original mortgage was due, the mortgagee consented to a depreciation of the amount or sum of money claimed thereon, and to a further postponement of the debt, and its division into two instalments, and the mortgagor executed a second mortgage, on other property, as additional security for the debt. The agreement is recited in the second mortgage. The debt was the same debt as in the first mortgage, and is is conceived that but one judgment was necesary. No authority has been cited on this point, to show its error.

V.—Another ground assigned is, that there is error in the original judgment, because the property foreclosed is not mentioned.

The decree mentions the property by reference to the original petition and mortgages filed in the cause. On reference to the books of practice and forms in the Courts of Chancery in England, the property is never otherwise described than as "the mortgaged premises in question;" but that it is argued ought not to be sufficient here, where the proceedings are not recorded after final decree—especially where the decree of foreclosure creates a legal state in the mortgagee. The counsel has just reversed the order of things in England—the decree of foreclosure is the evidence of a title in the mortgage, not defeasible at law or in equity by the mortgagor, and there a simple reference to the property as the 'mortgaged premises in question,' is deemed sufficient; while in Florida, the foreclosure so called gives the mortgagee no estate in the property mortgaged, but it is to be sold under an execution issued as in other cases, under ordinary judgments, and the purchaser takes the property by virtue of the sale under the execution. If the mortgagee obtains the property, it is by virtue of the sale, in the character of purchaser, and not in the capacity of mortgagee. No authority has been cited on this point, nor have I been able to find any.

VI.—Another ground assigned, is, that there is error in the judgment as amended, because it awards execution against the mortgaged property. In this, the plaintiff in error is mistaken. It awards execution against "the mortgaged property according to the statute." The judgment is, therefore, controlled by law; and if the law gives a recourse over, after the mortgaged property is exhausted, against the other real and personal estate for any deficiency, it may be had under this decree. The effect of the decree is to di-

rect the execution *primarily* against the fund provided by the express covenant and deed of the debtor.

But if the counsel on the other side are right in supposing that the execution is, by the decree, restricted to the mortgaged property, it is still within the authority of the law, upon the maxim, *omne major in se continet minus,* it being within the power of the court. An act or judgment may be void for exceeding the authority given to do or pronounce it, when the excess cannot be separated from that portion which is within the authority; but no act or judgment has ever been declared void for not having gone so far as it might have done. Neither can it be declared to be error on the complaint of a party who is not injured thereby. The restriction is against the plaintiff or mortgagee, and he is the injured party, if any one is injured. If it is error, it is an error in favor of the party complaining.

VII.—Another ground assigned for error is, that the amended judgment is incomplete. In compliance with the intimation of the Judge below, the petitioners' counsel amended the judgment by adding thereto a specific description of the property contained in the mortgage, with the appropriate introduction, &c., and to which the court will be pleased to refer. It is contended that a full and complete entry should have been made as the amendment. In this objection, I apprehend there is no force.

VIII.—Another ground assigned for error is, that it does not appear by the amended judgment how much of the original entry is retained, and how much is meant to be abandoned.

The answer to this is, that from reference to the entries, it will appear most fully, that nothing was intended to be abandoned.

IX.—Another, and the last ground assigned for error is, that the judgment, as it now stands is irregularly entered, and inconsistent in its several parts. For the answer to this objection, I crave reference by the court to the judgment as it stands; the irregularities complained of in this assignment are not pointed out, neither is the inconsistency in its several parts shown by specification of the particulars. To the intelligence and justice of the court is it submitted by the defendants in error.

It appears to me that the several errors complained of, viewed in the most favorable aspect for the plaintiff in error, are of the most technical character—that no injury has been done to him, and that the judgment of the court below should be affirmed.

Long & Walker, for plaintiff in error:

1. The last error assigned (by leave of the court, and not discussed in the opening argument,) may, with propriety, be first considered, viz: That the court had no jurisdiction in this cause, because the plaintiff or petitioner had no existing mortgage to secure his debt when he filed his petition. The statute under which this proceeding was attempted, gives a court of law a very special jurisdiction, not only to render a judgment for the mortgage debt, but also to foreclose the mortgage. It is plain that the statute does not authorize the court upon *petition,* at the *first term,* to foreclose a mortgage, as is done in equity, and merely order the mortgaged property sold; nor does the statute authorize a judgment to be rendered for the debt merely, as at law, without a foreclosure of the mortgage. This is plain. In order to give the court jurisdiction at law to render a judgment for the debt, and foreclose the mortgagor of his equity or right of redemption by petition, at the first term of the court after the filing the petition, it is plain that the petitioner must not only have a debt due him, but he must also have a valid subsisting mortgage. This will not be denied. Now, it is equally plain from the face of the petition, that the mortgages filed with this petition had been regularly and formally foreclosed about one year before the institution of this suit. The petition states that the mortgages were due by two instalments, and that, for the first instalment, a petition was filed in Leon Circuit Court, a judgment was rendered on the 2d day of May, 1846, *"and decree of foreclosure of all right and equity of redemption of or in the said mortgaged property,"* &c. If then, "all right or equity of redemption of and in the said mortgaged property" had, by "decree of foreclosure," been already barred and cut off, we think it beyond dispute that there was no existing mortgage. There remained no right or equity of redemption to bar or foreclosure in May, 1847, if it had *all* been "foreclosed by decree" in May, 1846. The only answer which has been made to this point is, that this decree of foreclosure of 1846, recited in the petition, was only as to the *first instalment.* This answer, we reply, is a mere matter of fact, for the language is, that *"all* right or equity of redemption of or in the *said mortgaged property."* Language cannot be more plain. No part of the property is reserved from this decree of foreclosure, nor *any* part of the right to redeem. In other words, *all* the right or equity of redemption of *every* part of the

property is specially barred and foreclosed. From this view, it follows that, as petitioner had no mortgage, he had no place in court, and the court had no jurisdiction to render a judgment for his debt, in the summary and peculiar mode adopted. And here we may remark, that if the court had no jurisdiction of the cause, consent of defendant could not confer it, even if he had consented. The whole proceeding becomes simply and absolutely void. It is scarcely deemed necessary to cite authorities to prove that when a special, summary and stringent remedy is given to the courts by statute, it must be strictly pursued, in order to give the court jurisdiction. "If a new remedy be given by a statute in a particular case, this shall not be extended to alter the common law in any other case." 9 Bacon's Ap., title "statute," page 245. "Every fact necessary to give the court jurisdiction in a *summary* proceeding, must appear of record, to give the judgment validity; if they do not appear, the judgment is *coram non judice* and void." 3 Yer., 355. 3 Hump., 313—cited 2 supplement to U. S. Digest, page 253, par. 137. Bates *v.* Merchants' Bank, 8 Porter R., 99. Leverett *v.* Pl. and Mer. Bank, 8 Porter R., 104. Webb *v.* Brown, 3 Pike's (Ark.) Rep., 488.

2. But it is contended by defendant in error, that this judgment cannot be now reversed, because it is a judgment by confession, &c. Two answers exist to this position, either of which is demed sufficient. In the first place, if we are correct in the first position assumed, that the court had no jurisdiction, because the petition showed upon its face that the petitioner had no existing mortgage, then it is sufficient to refer to the familiar principle, that *consent* cannot confer jurisdiction.

But, if the language of the supposed consent and confession of judgment is examined, it will be found to fall very far short of consenting to what was done by the court. This alleged agreement or consent is in the record stated to have been endorsed on the petition, and is without date. The record states that the petition was filed on the first day of the Spring term, 1847, of the court. It was, then, certainly so written and endorsed on the petition that day, or some previous day. It clearly is not any manner of pleading, for the only pleading allowed under our statute for the "foreclosure of mortgages at common law," is declared to be "objections," which must be filed fifteen days before court. It is no confession of judgment, for that must be *ore tenus,* in the presence of the court, and addressed to it.

This supposed confession of judgment could not be made to the petitioner, for he could make no use of it, or make it a matter of record. It must be, then, a mere agreement between the plaintiff and defendant, before the filing of the petition, or at that time, and an admission of certain facts. Now, what is thus admitted and agreed to?—In the first place, he acknowledges "due and legal service of notice of intention of petitioner to institute this suit"—that is, he had been notified for four months of this intention. In the next place, he is "consenting that *said* petition (*no* petition having been previously mentioned) shall be filed as of the first day of the Spring Term, 1847, of Leon Circuit Court"—that is, he agreed that petitioner might that day file his petition—a thing he had as good a right to do before as after this agreement, so far as we can perceive. "And I do hereby, under my hand and seal, *confess* judgment, and *agree* that decree of foreclosure be rendered at said Spring Term, 1847, of Leon Circuit Court, with a stay of execution till the 1st day of February, A. D., 1848." Now, if this *confession* had been made to the *Court*, as it must have been to be of any force, and as it clearly was not in fact, it is to be observed that he does not also confess foreclosure, but only agrees that a decree for that purpose may be rendered at the Spring Term, 1847. Now, does all this give the court jurisdiction? The petition was only filed on the first day of the term, and Shepard only admits that fact. It should have been filed four months before that time. This is admitted by the counsel for defendant in error, for he contends that that must be inferred from the language of the statute, and from the provision that defendant must, if he defends at all, file his objections fifteen days before court. On this point the language of the statute is imperative, and not merely directory, viz: "And the said petition, together with the original mortgage, shall be filed in the office of the clerk of the court to which the application for foreclosure shall be made, at least four months when the foreclosure is to be of real property, and two months when it is to be of slaves, or other personal property, before the term of the court at which the judgment of foreclosure *shall* or *can* be demanded or *rendered*." Thomp. Dig. 376. Now the judgment is to be *rendered* by the court, and the terms *shall* or *can* as strictly apply to its action, to wit: the rendering of judgment, as to the action of petitioner, to wit: the demanding a judgment. Leave out the word "demanded" and the sentence would read that the petition, &c., shall be filed four months

before the judgment "shall or *can* be rendered." Is not all distinction destroyed between summary and special remedies by statute, and matters of ordinary common law jurisdiction, if the court may or can render judgment under this statute when the petition has not been filed the length of time prescribed by its express terms? Has Shepard waived this irregularity? Surely not. The courts, as we have before remarked, can only get jurisdiction in pursuance of the statute—that is by having the petition filed four months before court, with notice to defendant. The notice is admitted, but not the filing according to law.

We will barely suggest, what must be too apparent to need illustration, that a judgment cannot be confessed under *hand and seal*—the thing is absurd, and without meaning. "The rendering a judgment is a judicial act, to be done by the court only." Mathews *v.* Moore, 2 Mur., 181. It is plain this endorsement on the back of the petition is the cause of the rendition of this judgment, and that the same is and was not a legal sufficient cause therefor. It is plain that the recital in the face of the decree that the petition had been '*duly* filed,' is contradicted by other parts of the record, which show it was not filed four months before court, but only on the first day thereof.

Again: This pretended confession of judgment is bad for two reasons not yet mentioned. First, it does not state in whose favor the judgment is so confessed. The name of the petitioner is neither stated in the caption nor in the body of the instrument. If this is a confession that somebody may have judgment, it does not say who, and no one will pretend that a court can do more than record the confession as made, whether in writing or verbally. Secondly there is no sum mentioned for which judgment is so confessed under hand and seal. This point has been expressly ruled by the Supreme Court of New York, where it is laid down that "a confession of judgment ought to be for a certain and specified sum." Nicholas vs. Hewett, 4 John Rep., 423. In that case, pending its trial in the court below, the parties referred the same to arbitrators. Before the award was known or punished, the court inquired whether the judgment should be confessed, according to the award when made. To this both parties agreed, and shortly thereafter the award came into court, and was entered accordingly for one of the parties. This judgment was reversed on error, upon the express ground that the confession of judgment was for no particular sum.

Again: But, if for the sake of argument, this could be construed into a confession of judgment, and consequent waiver of errors, the record does plainly show that the same was made before suit brought, and it is therefore void by our statute. Thompson's Dig., 350. This statute not only makes void all powers of attorney for confessing or suffering judgments to pass, &c., made before action brought, but also expressly makes void *"all general releases of error."* If this be a release of error at all, it is only so because it is a confession of judgment, and therefore sufficiently *general* to be embraced within the terms of this statute. The question of fact then only remains: was it made before or after "action brought?" If this action was ever legally brought at all, and this is questionable, it certainly was not until the petition was filed. Now upon examination of the record, it will abundantly appear that this endorsement was upon the petition when handed to the clerk and filed. The clerk would not have permitted a record to be so endorsed, after it was filed, and the record expressly sets it forth as an endorsement on the petition. No process had issued from nor any paper filed in the court before, and Shepard had only been notified of an intention to institute the suit. From this view of the subject it becomes apparent that if it be possible to confess a valid judgment in a suit before it is instituted, a thing little short of absurd, still such a confession, under our statute, does not operate a general release of error, as in other cases of confession of judgment. It cannot be said that this release of error is not meant by our statute, as it is only a release implied by law from the fact of confessing the judgment—assuming that a judgment can be confessed before action brought—because the words of the statute are *"all* general releases of error." "All" includes implied releases as well as express.

It is contended by counsel for defendant in error, that in fact the amended decree does not restrict the execution to be issued thereon from issuing as "in other cases," viz: against the goods and chattels, lands, and tenements of defendant. It is also admitted that if this error does exist in fact, it is well assigned if it and all other errors were not waived by confessing judgment, &c. That it is not waived, we have endeavored to show, and will only refer to the language of the decree to prove that it exists in fact. Petitioner is to have execution against *"said mortgaged property* according to the statute," &c. The mortgaged property and no other is mentioned

of which execution shall be had—whether such execution is to be according to statute or otherwise. But does this reference to the statute help the matter? Is the Clerk to judge what statute is referred to, and then judge what the statute requires? This would be too uncertain. This has been expressly decided in the case of Harman v. Childress, 3 Yerger, 426.

To recapitulate briefly:

1. The judgment is void, for want of jurisdiction in the court. 1. Because the petitioner had no valid existing deed of mortgage, the same having been foreclosed a year before; and 2. Because the petition under our statute had not been filed four months before the term of the court at which the judgment was rendered—and if this be true, consent, if given, cannot confer jurisdiction.

2. The judgment is erroneous, if not void. 1. Because the endorsement of Shepard upon the petition, which is relied upon to justify the rendition of the same, was made before the filing of petition or institution of the suit. 2. Because the pretended confession of judgment does not mention the person in whose favor the confession is made. 3. Because no sum or amount is named, for which judgment is confessed. We will not add to the argument of our colleague (Mr. Archer) upon the other errors assigned.

The judgment should be reversed, and the cause remanded with instructions to dismiss the petition.

LANCASTER, Justice, delivered the opinion of the court.

The last assignment of error is first noticed in the briefs of counsel, and will, therefore, be first disposed of by this court. It alleges the court had no jurisdiction, under the statute, to render judgment for the debt, and foreclosure of the mortgages, because from the petition, it appears the mortgages had been foreclosed at a former term of the court, when judgment was rendered for an instalment due on them, and therefore, there remained no mortgages now to foreclose. Admitting the facts to be correct, it is difficult to see how they affect the jurisdiction of the court. *Jurisdiction* consists in authority to try the subject-matter of the suit, and over the person of the defendant. These two requisites attaching, it would be difficult, if not impracticable, successfully to assail the jurisdiction even of a court of special powers. But that the Circuit Courts of this State are

courts of general original jurisdiction, will be abundantly manifest to every one who reads the 6th clause of the 5th article of our State Constitution: "The Circuit Courts shall have original jurisdiction in all matters, civil and criminal, within this State, not otherwise excepted in this Constitution;" and by the 8th clause of the same article, they are invested with the original equity jurisdiction, until the General Assembly shall establish and organize a separate equity court or courts with that jurisdiction. That has not yet been done, and it is not known that the Constitution makes any other exception to the original jurisdiction of the Circuit Courts.

The Circuit Court was then a court of general original jurisdiction, and having jurisdiction of the foreclosure of mortgages, this suit was brought to foreclose the mortgages therein set forth, as well as for judgments for the sum alleged to be secured by them, as owing and due from defendant to plaintiff in the action. This was the subject-matter of the suit, and we apprehend no one will seriously deny the jurisdiction of the Circuit Courts over such a subject-matter. But that the jurisdiction may properly attach to render judgment, it is necessary also for the court to have jurisdiction of the party defendant. The ordinary mode to acquire this jurisdiction over the party defendant is by *summons ad respondendum*, admonishing him to appear in court and defend against the suit. By law this summons should be served on the defendant by the officer of the court, at least ten days before the first day of the term; yet an acknowledgment of service endorsed on the writ by the defendant, or an appearance in court and plea to the merits, or confession of judgment, will be sufficient evidence of the court's jurisdiction over the person of the defendant, and so, it is believed, has been the uniform practice in the courts, from the date of the act to regulate judicial proceedings.

These proceedings were instituted under the act of December 11th, 1824, before referred to, which authorizes courts of law, in addition to the power before possessed, of rendering judgment for the debt due plaintiff by defendant, to foreclose a mortgage given to secure its payment, and to issue execution as in other cases. But in this particular case, the law requires personal service of notice of the intention of the party to institute his suit, and that service of this notice shall be made by the officer appointed to serve writs issuing out of and returnable to said court, four months, when the foreclosure is to be of real property, before the term of the court at which judg-

ment shall be rendered. It also requires that the petition for judgment and foreclosure, together with the original mortgage, shall be filed in the office of the clerk of the court, at least four months before the term of the court, at which judgment of foreclosure of real estate shall or can be demanded or rendered.

These provisions are clearly intended for the benefit and protection of the defendant, and he has an undoubted right to insist upon their literal and full performance, before a valid judgment and foreclosure on a mortgage can be rendered against him, unless he thinks proper to waive them.

The former was intended, perhaps, partly to afford him time to redeem, as well as time to prepare for his defence; the latter that he might understand and inspect the demand against him, as well as afford him time to mould that defence. If it was shown the subject matter of this suit was not comprehended by the statute of 1824, or it was doubtfully comprehended, or that a prior judgment at law had been given upon the identical demand for which this suit was instituted, according to the decisions of this court, in 1 Flor. R., 182, the statute affording a new remedy should be rigidly construed, so as not to take jurisdiction in any doubtful case. The requirement of a statute for bringing a party defendant before the court is never so rigidly, but only substantially observed. The act of 1828, regulating judicial proceedings, provides for issuing process at the commencement of actions at law, (different from the common law writ of *capias ad respondendum*,) which, by the act, is to be served by the officer at least ten days before the first day of the term to which it is returnable. By the common law, it is required to have the body of the defendant in custody, to give the court jurisdiction of the person; yet here a summons, regularly served, as required by the act of 1828, gives the court jurisdiction of the person of the defendant. This act greatly modifies, in many respects, the practice as at common law, yet no one has thought or claimed that it should be construed strictly. The courts in practice have held, if a party acknowledges services on the back of the writ, it is good. If a party file a declaration, and the defendant plead thereto by confession of judgment, without writ issued or served, it is good. Yet the statute no where by express enactment provides for these cases, but they have been continually held to be within the reason of the act; and this practice, upon a sound construction of the statute, it is not doubted

is correct. The court can discern no good reason why the statute of 1824, to regulate the foreclosure of mortgages at common law, so far as respects the mode of summoning the defendant into court, or the time of filing the petition for foreclosure, should not be subjected to the same rule of construction. "An acknowledgment by the defendant of service of the writ, and a waiver of a particular entry required in the case, is sufficient to give jurisdiction of the person, and every thing consistent with the record will be intended to sustain the judgment." 9th Porter's R., 291.

The reason assigned in this case against the jurisditcion of the court, appear rather to be such as might have been made in the court below to the court or petition, and to the writ. But, according to logical reasoning and logical practice, they were waived by a consent of judgment. Had no written acknowledgment or consent been executed, the court certainly would not have proceeded to judgment or foreclosure until notice had been served on defendant, and petition filed acording to the requirements of the statute—assuming that these objections could be only properly addressed to the court, and the writ would be an admission of the jurisdiction of the court.

But it is urged that petitioner showed by his petition he had no existing mortgage to secure his debt at the time of filing it, and, therefore, the court had no jurisdiction. This objection, it seems to the court, would best be made by way of plea in bar to the action, and that plea would admit the jurisdiction of the court. Yet we cannot see how in any shape it should avail the defendant, who, upon the back of the very petition in which this allegation is contained, confesses judgment for the sum therein alleged to be due, and agrees that a decree of foreclosure shall be rendered on the mortgages therein set forth and sought to be foreclosed, at the Spring Term of the court in 1847. Is it asked of this court to decide there was no existing mortgage in favor of petitioner against the defendant, Shepard, when he, Shepard, under his hand and seal, agrees there is, and that it may be foreclosed, and this agreement, too, made, in consideration of a stay of execution?

The rule of law, that where the court has not jurisdiction of the subject-matter of a suit, consent cannot give it jurisdiction, is, without doubt, correct; but as to the person of the defendant, the formal service of the process, or the time of filing the declaration or petition,

though necessary steps, are rendered unnecessary, if the defendant appears and pleads issuably, or confesses judgment—and having done so, he ought not afterwards to be permitted to take advantage of irregularities in those respects. We think, therefore, the court had jurisdiction of the suit, by having jurisdiction of both of the subject matter of the suit, and by the defendant's acknowledgement of due service of process, of the filing the petition on the first day of the term, and consenting that judgment might be rendered at the said term and foreclosure decreed, with a stay of execution, &c. This assignment of errors is, therefore, overruled.

The first error assigned, and next to be considered is this: The agreement to confess judgment is void under the statute, which enacts, "All powers of attorney for confession or suffering judgment to pass by default or otherwise, and all general releases of error made or to be made by any person or persons whatsoever within this State before action brought, shall be, and are hereby declared to be, absolutely null and void." Thomp. D., 350. Upon this assignment of error, it will sufficiently express the views of the court to say, the agreement of the defendant, under his hand and seal to confess judgment, is not a power of attorney to confess judgment, and is not within the prohibition of the statute. Neither does it appear from a careful examination of that agreement, written on the back of the plaintiff's petition, that it was made before action brought. They appear rather to have been done simultaneously, and if necessary to give effect to an agreement made on a valuable consideration, to wit: a delay of payment. The court will understand it to be admitted that notice of the intention of the plaintiff to bring his suit (which notice is the intention of the suit) was given before the defendant, Shepard, signed any agreement on the back of the petition. We think this assignment of error should be overruled.

The second error assigned, is, "there is error in giving one foreclosure on two mortgages."

The debt, which the two mortgages were given to secure, was one debt, due from defendant, Shepard, to the plaintiff, Kelly. The last mortgage was cumulative or additional security on the first, and both were but security for one debt. If the debt had been paid, which they had been made to secure, that act would have discharged both mortgages; if it became necessary to push that debt to judgment, no good reason is perceived why the equity of redemption should

not be foreclosed on all the property mortgaged to secure its payment; and this, we think, within the equity of the statute, the court had power to do. This assignment of error is, therefore, we think, not well taken, and is overruled.

Third error assigned, "there is error in the original judgment, because the property foreclosed is not mentioned."

So much of the original decree as is material in this assignment of error, is in these words: "And it is further adjudged, ordered and decreed, that the said John S. Shepard, mortgagor, and all persons claiming or to claim by, through, or under him, shall be, and they are hereby forever foreclosed and barred of, and from all right and equity of redemption of or in the property mortgaged by the said deeds of mortgage in said petition set forth, and therewith exhibited, and every part thereof, and that execution issue according to the statute in such case made and provided, after the first day of February, Anno Domini, one thousand eight hundred and forty-eight, until which date execution will be stayed according to the agreement before stated." It is perceived that, by this original decree, the equity of redemption of or in the property mortgaged by the said deeds of mortgage exhibited with the petition and therein set forth, is foreclosed. *Id. certum est quod certum reddi potest.* And so far as can be collected from the forms in the Courts of Chancery in England, it is believed no more specific or certain description of the property is contained in the decree of foreclosure than the mortgaged premises in question. It is argued if such a decree be good in England, it ought not to prevail here, because the exhibits are not recorded after final judgment. By legal intendment, the files of the court are as secure as the records, and if this were not so, the law requires mortgages to be recorded when or soon after they are executed. This, by the petition and exhibits, appears to have been done, and admitting the files of the court should be lost or destroyed, it is fairly presumable, the record of these mortgages is as safe as the record of the judgment. We think the property, intended to be foreclosed, is sufficiently designated by reference to the mortgages in which it is specified, and a specific statement of it in the decree of foreclosure, is immaterial and unnecessary. The third error assigned is therefore, in our opinion, not well grounded, and is overruled.

The fourth error is, "There is error in the judgment as amended, because it awards execution against specific property."

The 8th sec. of the act of 1824, Thompson's Digest, 377, is in the words following: "The judgment of the court on the foreclosure of a mortgage, shall in all cases be entered up and filed, and execution shall issue thereon as in other cases." By the law applicable to other cases, execution goes against the lands and tenements, goods and chattels of the defendants in execution. The amended decree, after specifying the mortgaged property, adds, "and that said petitioner have execution against said mortgaged property, according to the statute in such case made and provided." It is contended if this be error, it is in favor of the plaintiff in error, and unless he is injured by it, he cannot take advantage of it. Without contravening the force of this objection, or without stopping to enquire narrowly, whether a party might not be injured by subjecting a specific fund (if a favorite fund) to execution, when the law requires that execution shall be against the lands and tenements, goods and chattels of the defendant, upon an examination of the original judgment and decree entered in this cause, it seems to the court that said judgment and decree is good and valid in law; and that the amended judgment and decree entered on Friday, the 7th day of April, A. D. 1848, is, for the reasons set forth in the fourth assignment of errors, erroneous: wherefore, the said assignment of error, so far as applicable to said amended decree, is allowed and sustained.

The *fifth, sixth* and seventh errors assigned, having reference to the judgment as amended, that amended judgment being to be reversed and vacated, it is deemed unnecessary to examine.

It is, therefore, ordered, adjudged and decreed that the original judgment and decree of foreclosure, rendered in this cause at the Spring Term, eighteen hundred and forty-seven, be in all things affirmed, and that execution issue thereon according to law; and that the amended decree of foreclosure, rendered *nunc pro tunc* in said cause on the 7th day of April, A. D. 1848, be set aside and reversed, and that the appellant recover his costs, &c.

UNION BANK OF FLORIDA *vs.* PARKHILL'S ADMINISTRATORS *de bonis non.*

S. PARKHILL'S ADMINISTRATORS *de bonis non vs.* UNION BANK OF FLORIDA.

The Bonds made by the late Territory, payable to the Union Bank of Florida, are, under the charter of that institution, the property of the Bank, and the funds arising from the sale of them, the funds of the Bank.

Shares in the Union Bank, are the mortgage securities given for stock, and a pledge of shares is a pledge of those mortgage securities.

The mortgage given by the stockholders to the Bank was executed for the purpose, 1st. as provided by the 8th sec. of the charter, of securing payment by the Bank, of the principal and interest of the bonds. 2d. Of securing payment by the stockholder to the Bank, of his stock note or obligation and interest, if he fails to renew the note and pay interest as provided in the 29th section.

When a stockholder of the Union Bank fails to renew his note, and pay up the interest, if the Bank shall file for cancellation with any officer of the government whose duty it may be to receive them for cancellation, or with the Clerk of the Court in which the suit is pending, as many Territorial Bonds as were issued on the faith and value of the mortgage securities of such defaulting stockholder, the Bank, upon judgment rendered and execution issued, may of right levy upon and sell the mortgaged premises of such defaulting stockholder, to be applied to the extinguishment of the judgment rendered on his stock note debt together with interest due and costs accrued.

A stockholder has a right to a continuance of the credit or loan which the charter gives him *only* upon his renewing his note and paying up the interest annually—and the taking of interest in advance is not a violation of the charter.

Under the plea of *plene administravit*, an administrator cannot be allowed to offer in evidence a receipt for the payment of money by him which payment has been rejected and disallowed by the probate court. Before any right attaches to offer any evidence of expenditures made by the administrator under this plea, such expenditures must have been allowed by the court of probate. The action of that court in regard to accounts of executors, &c., is conclusive, unless appealed from.

On the 31st March, 1846, the Union Bank of Florida instituted suit in Leon Circuit Court against Martha Ann Manly, administratrix, (and Hiram Manly, in right of his wife, administrator,) and William

D. Moseley, administrator *de bonis non* of Samuel Parkhill, deceased, to recover the amount of a sealed note of defendant's intestate, of which the following is a copy:

"Dolls. 94,182 22-100. Tallahassee, Dec. 9, 1840.

"Six months after date I promise to pay to the Union Bank of Florida at their Banking house in the City of Tallahassee, ninety four thousand one hundred and eighty two 22-100 Dollars, for value received, for securing payment whereof I do hereby pledge my shares in the capital stock of said Bank.

SAMUEL PARKHILL, [SEAL.]

The declaration is in debt, and contains a special count on the note, and common count for *money had and received.*

The defendants filed various pleas as follows:

And the said defendants, as administrators and administratrix *de bonis non* as aforesaid, by J. T. Archer, their attorney, come and defend the wrong and injury when, &c., and as to the first count in the declaration say, that the said supposed writing obligatory is not the deed of the said Samuel Parkhill, deceased, and of this they put themselves upon the country, &c.

And for further plea in this behalf, the said defendants as administrators and administratrix *de bonis non* as aforesaid, say *actionem non,* &c., as to the second count in the declaration, because they say that the said Samuel, in his life time, was not indebted to the said plaintiff, in manner and form as in the said second count is alleged, and of this they put themselves upon the country, &c.

And for further plea in this behalf, the said defendants, as administrators and administratrix *de bonis non* as aforesaid, say *actio non,* &c., as to the first count in the said declaration mentioned, because they say that, before the institution of this suit, to wit, on the first day of January, in the year of our Lord one thousand, eight hundred and forty-four, to wit, at the county of Leon aforesaid, Martha Ann Manly, administratrix, and Hiram Manly, administrator, in right of his wife, said Martha, of the estate of said Samuel, which remained at his death, paid to the said plaintiff the said sum of ninety-four thousand dollars, in the said writing obligatory mentioned, together with all interest then due thereon, according to the form and effect of the said writing obligatory and this the said defendants, as administrators and administratrix *de bonis non* as aforesaid, are ready to verify; wherefore, they pray judgment whether the said plaintiff ought to

have or maintain their aforesaid action thereof against them, &c., by reason of any thing in the first count mentioned.

And for further plea in this behalf, the said defendants say *actionem non*, &c., because they say that the said plaintiff before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, in a large sum of money, to wit, in the sum of three hundred thousand dollars, for the proceeds of the sale by the said plaintiff of one thousand four hundred and twenty-eight shares of capital stock in the Union Bank of Florida of the said Samuel deceased, before that time sold by the said plaintiff, on account of the said Martha Ann, as administratrix, and that said Hiram, as administrator, in right of his wife, said Martha, of the estate of said Samuel which remained at his death, which said sum of money has never been paid by the said plaintiff to the said Martha Ann and Hiram, as administratrix and administrator as foresaid, or to these defendants, as administrators and administratrix *de bonis non* as aforesaid. And the said defendants further say that the said plaintiff, at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators *de bonis non*, &c. as aforesaid, in the further sum of three hundred thousand dollars, for divers goods, wares and merchandizes sold and delivered to the said plaintiff, and at the request of the said plaintiff, by the said Martha Ann and Hiram Manly, administratrix and administrator as aforesaid, of the estate of said Samuel which remained at his death; and for money by the said Martha Ann and Hiram, as administratrix and administrator as last aforesaid, before that time lent and advanced to, and paid, laid out and expended for the said plaintiff, and at the request of the said plaintiff; and for money by the said plaintiff before that time had and received, to and for the use of the said Martha Ann and Hiram Manly, as administratrix and administrator as aforesaid; and for money due and owing from the said plaintiff to the said Martha Ann and Hiram Manly, as administratrix and administrator as last aforesaid, upon an account stated between them; and the said defendants further saith that the said plaintiff before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, and the further sum of three hundred

thousand dollars, for money by the said defendants, as administrators and administratrix *de bonis non* as aforesaid, before that time lent and advanced to, and paid out and expended for the said plaintiff, and at the request of the said plaintiff; and for money by the said plaintiff before that time had and received, to and for the use of the said defendants, as administrators *de bonis non* as aforesaid; and for money due and owing from the said plaintiff to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, upon account stated by them; which said sums of money so due and owing to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, exceed the debt and damages in the plaintiff's declaration mentioned, and out of which said sums due as aforesaid, the said defendants, as administrators and administratrix *de bonis non* as aforesaid, are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of the said debt and damages, and this the said defendants are ready to verify: wherefore they pray judgment that so much of the said several sums of money above mentioned, as exceed the debt and damages in favor of the said plaintiff, be allowed to these defendants, according to the form of the statute in such case made and provided.

And for further plea in this behalf, the said defendants say *actionem non*, &c., because they say they have fully administered all and singular the goods and chattels, rights and credits, lands and tenements, which were of the said Samuel Parkhill, deceased, at the time of his death, and which ever came to the hands of these defendants, as administrators and administratrix *de bonis non* as aforesaid, to be administered, to wit, at the county aforesaid; and that they, the said defendants, have not nor on the day of the commencement of this suit, or at any time since, had they any goods or chattels, lands or tenements, which were of the said Samuel Parkhill, deceased, at the time of his death, in the hands of these defendants, as administrators and administratrix *de bonis non*, to be administered, and this the said defendants are ready to verify: wherefore, they pray judgment whether the said plaintiff its action thereof against them ought to have or maintain, &c.

And for further plea in this behalf, the said defendants say *actio non*, &c., because they say that heretofore and before the grant of letters of administration *de bonis non* to these defendants, and before the marriage of the said Hiram Manly and Martha Ann Manly, and

before the institution of the suit, to wit, on the fourth day of April, in the year of our Lord one thousand eight hundred and forty-two, in the county aforesaid, one Henry Bond impleaded the said Martha Ann Manly, (then Parkhill) as administratrix of the estate of said Samuel which remained at his death, before the Superior Court of the Middle District of the Territory of Florida in and for the county of Leon, in an action of trespass on the case on promises for and on account of certain promises and assumptions by the said Samuel Parkhill in his life time, made to the said Henry Bond, and proceedings were so far had therein that afterwards and before the marriage with said Hiram Manly by said Martha Ann Parkhill, and before the commencement of this suit to-wit, on the fifth day of May, in the year last aforesaid at the spring term of the Superior Court aforesaid, to-wit, at the county aforesaid, the said Henry Bond, by the consideration and judgment of the said court recovered against the said Marthat Ann Manly (then Parkhill) as administratrix, as aforesaid, the sum of twelve thousand four hundred and forty six dollars and fourteen cents for his damages which he had sustained by occasion of the non-performance by said Samuel in his life time, and said Martha Ann as administratrix as aforesaid, after his death, of the said promises and undertakings, so by the said Samuel in his life time made to the said Henry Bond, to be levied of the goods and chattels, slaves, lands, and tenements of said Samuel Parkhill, deceased, in the hands of the said Martha Ann Manly, (then Parkhill), to be administered, whereof the said Martha Ann, as Administratrix as aforesaid, was convicted, as by the record and proceedings thereof, remaining in the Circuit Court of the Middle Circuit of the State of Florida in and for the County of Leon, more fully and at large appears, which said judgment against said Martha Ann, as administratrix, as aforesaid, is still of force, and not paid, satisfied, vacated, cancelled or reversed, and the said defendants as administrators and administratrix *de bonis non*, as aforesaid, further say, that they have fully administered all and singular the goods and chattels, rights and credits, lands and tenements, which were of the said Samuel at the time of his death, and which ever came to the hands of these defendants, as administrators *de bonis non*, as aforesaid, to be administered, to-wit, at the county aforesaid, except goods and chattels of small value, to wit, of the value of five dollars; and that they, the said defendants, as administrators and administratrix *de bonis non*, as aforesaid, have not, nor on the day of

the commencement of this suit, or at any time since, had they any goods or chattels, lands or tenements, which were of the said Samuel, deceased, at the time of his death, in their hands as administrators and administratrix *de bonis non,* as aforesaid, to be administered, except goods and chattels, of the value aforesaid, and which are not sufficient to satisfy the judgment aforesaid and are liable for the payment of the same: And this they are ready to verify. Wherefore they pray judgment whether the said plaintiff ought to have or maintain their action aforesaid against the said defendants as administrators and administratrix *de bonis non* as aforesaid, &c.

And for further plea in this behalf, the said defendants say *actionem non,* &c., as to first count, because they say that the sole consideration for which the said writing obligatory was given by the said Samuel, was the loan by the said plaintiff to the said Samuel, of ninety thousand, one hundred and seventy seven 34-100 dollars, in notes of the Union Bank, calling for that sum, but then greatly depreciated, and that thereby the said plaintiff did knowingly, wilfully take and receive, and insist upon a greater rate of interest than eight per centum per annum, contrary to and in violation of the provisions of charter of the said Union Bank: And this the said defendants are ready to verify, &c. Wherefore they pray judgment whether the said plaintiff ought to have or maintain its action thereof against these defendants as administrators and administratrix *de bonis non,* as aforesaid, by reason of any thing in the first count mentioned.

The plaintiff moved to strike out the first plea of the defendants, but afterwards joined issue thereon.

To the second plea, the plaintiff demurred, but afterwards joined issue thereon.

To the third, fourth, and fifth pleas, the plaintiff tendered issue upon the facts, which was joined by the defendants.

To the sixth plea the plaintiff filed a replication as follows:

And the said plaintiff, as to the said plea of the said defendants by them sixthly above pleaded, saith that he the said plaintiff, by reason of anything in the said plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says that the said judgment in the said plea mentioned was claimed against the original administrator and administratrix of Samuel Parkhill, deceased, and that the same is in no wise binding upon the said defendants in this present suit, administrators and ad-

ministratrix *de bonis non* of the said Samuel, and that the said defendants, administrators and administratrix *de bonis non* of the said Samuel, have not fully administered all and singular the goods and chattels which were of the said Samuel Parkhill, deceased, at the time of his death, and which came to their hands to be administered, but that they the said defendants, at the commencement of this suit administrators and administratrix *de bonis non*, as aforesaid, had goods in their hands to be administered, of the estate of said Samuel, over and above the said amount admitted in the said plea, and more than sufficient to pay and satisfy the debt of the said plaintiff above declared, and the damages on the same, and wherewith the said defendants might and could have satisfied the same: And this the said plaintiff prays may be enquired of by the country, &c.

The defendants joined the issue tendered by this replication. To the seventh and last plea, the plaintiff demurred, but by leave of the court the defendants were permitted to amend the last plea, and did so amend by filing in lieu thereof on the 29th June, 1847, the following amended plea:

And for further plea, &c., said defendants come and defend, &c., when, &c., and say *actio non*, &c., because they say that the said supposed writing obligatory is not the act and deed of their intestate the said Samuel, in his life time, but the same is and was when the same was made, sealed and delivered to the said Union Bank of Florida, wholly null, illegal and void, and is and hath been at all times since, wholly illegal, null and void, because the same was made and delivered for the sole and only consideration of a loan of money from said Union Bank of Florida to said Samuel in his life time, (he being then and there a stockholder, and the same being on a pledge of his stock) and that upon the said loan the said Bank wilfully and knowingly reserved and took more than the lawful rate of interest allowed to said Bank to take upon such loans, to wit, the sum of one hundredth of one per cent. interest per annum beyond the amount allowed by said charter and law upon the said loan of and from said Samuel in his life-time, contrary to the form of the statute in the case of the Union Bank, made and provided, and against the form and letter of its charter and powers, and transcending and going beyond and violating the same, to-wit: at the time and place of the delivery of the bond in the declaration mentioned: And this they are ready to verify.

Wherefore they pray judgment whether the said plaintiff ought to have or maintain its action aforesaid against these defendants.

On the same day the plaintiff demurred to the amended plea, and after argument, the demurrer was sustained by the court.

The cause was afterwards tried before His Honor, Judge BALTZELL, upon the issues joined, which were submitted to a jury duly empanneled for this purpose. On the 13th July, 1847, a verdict was returned and judgment entered, as follows:

The jury empannelled in this cause this day returned into court, and upon their oath do say: "We the jury find for the plaintiff $143,782 81-100, and no assets in the hands of the administrators." Therefore it is considered by the court, that the plaintiff recover against the defendants $188,364, 44-100, the debt in the declaration mentioned, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the defendant's intestate, when assets sufficient therefor shall come to the hands of the said defendants. But this judgment is to be discharged by the payment of the sum of one hundred and forty-three thousand seven hundred and eighty-two dollars and eighty-one cents, ascertained by the jury as aforesaid and the costs, and the said defendants in mercy, &c.

At the trial of this cause, the plaintiff excepted to various rulings of the court, which exceptions were noted in the following bill of exceptions filed by the plaintiff:

Be it remembered, that on this 13th day of July, in the year of our Lord one thousand eight hundred and forty-seven, this cause came on to be tried upon the issues joined, and thereupon the plaintiff offered in evidence to the jury the bond sued upon, to-wit:

Dolls. 94,182 22-100. Tallahassee, Dec. 9th, 1840.

Six months after date I promise to pay to the Union Bank of Florida at their Banking House in the City of Tallahassee, Ninety-four thousand one hundred and eighty-two 22-100 dollars for value received: for securing payment whereof I do hereby pledge my shares in the capital stock of said Bank. Witness my hand and seal.

SAMUEL PARKHILL, [L. S.]

which was read to the jury without objection. It was admitted by the plaintiff's counsel that the instrument was a Stock Bond evidencing a loan made under the 29th section of the charter or act of incorporation of the said plaintiff.

The charter of the Union Bank and the several amendments thereto, were offered in evidence by the said plaintiff: And it was expressly admitted by defendant's counsel that the requisition of the act of incorporation had been complied with, and that the Bank had gone into operation under authority thereof.

The said plaintiff, further to maintain the issues joined, offered to the jury the inventories and appraisement filed by the defendant Moseley, in the office of the Judge of Probate for Leon County.

These inventions and appraisements, were read to the jury, and embrace items as follows:

Slaves, - - - - - - - -	$75,925
Bonds, - - - - - - - -	3,142 60
Cash, - - - - - - - -	373 47
	$79,441 07

The said plaintiff also introduced and offered in evidence the audit by the Judge of Probate of Leon County, of the account of the defendant, William D. Moseley, up to 1st April, 1846, to wit:

ACCOUNT AUDITED TO THE 1ST OF APRIL, A. D., 1846.

DR. *William D. Moseley, administrator de bonis non, in account with the estate of Samuel Parkhill, deceased.*

I find this administrator chargeable for the following amounts, viz:

For notes and bonds, as per his inventory filed 15th January, 1845,			$3,142 60
Cash received from J. G. Gamble,			373 47
Inventory 16 slaves, filed June 22, 1844, appraised at			4,800 00
Inventory of 93 slaves, filed January 4, 1845, appraised at		$27,850	
Inventory of 112 slaves, filed January 4, 1845, appraised at	$37,275		
Less Error in addition,	100	37,175	69,825 00
Inventory of 13 slaves, filed 4th January, 1845, appraised at			4,000 00
Balance of hires at Springwood, as reported on account of administrator, filed 8th April, 1846, due January 1, 1846,			861 88
Rent of Springwood plantation for the year 1845, due 1 January, 1846,			125 00

Hires of negroes at Tallahassee, on 27th January, 1845, (after deducting the time from the date of levy, &c., as reported in the administrator's account, filed 8th April, 1846,) due January 1, 1846. 1,793 09

$80,121 04

CR.

I find this administrator entitled to allowance on this account as follows, viz:

For the appraised value of slave Celia, who died on the 4th January, 1845.		$500 00
For the appraised value of Cuba, a slave, who died on the 10th January, 1845.		100 00
For amount claimed on his account, filed 8th April, 1846, on vouchers No. 1 to No. 23, inclusive,	$2,433 90	
Less for the following amounts, viz:		
Voucher 10 suspended, not being filed.	$2 25	
Voucher 11 suspended, not being filed.	1 00	
Voucher 12 suspended, not being filed.	2 00	
Voucher 13, amount paid H. Manly, on account of wife's dower, suspended for evidence that dower has been decreed to her.	658 60	
Voucher 18, payment to J. T. Archer suspended, his receipt not being the proper voucher,	51 00	
Voucher 20, suspended in part, say amount p'd H. Manly for bill of D. Mc-		

Rany, Clerk, the same being improperly paid by this administrator,	32 14			
Voucher 22, paid H. Manly, on account of wife's dower, suspended for evidence that dower has been decreed to her,	560 24	1,307 23	1,126 67	
For 184 slaves, sold by John G. Camp, Marshal, for the disbursement of which, the vouchers are not yet filed, carried down to new account,		57,133 00		
Less error in Marshal's addition,		100 00	57,033 00	
For excess of appraisement over sales of 184 slaves, sold by John G. Camp, Marshal,			192 00	
For appraised value of slaves, remaining on administrators account, undisposed of, carried down,			16,000 00	
Balance carried down as cash on 1st April, 1846, subject to commissions and suspended items, when sustained,			5,168 69	$80,121 04
1846				
April 1. Balance of appraisement brought down,				16,000 00
Amount of sales by marshal, for which vouchers are not yet filed, brought down,				57,033 00
Balance as cash on hand this day, subject to commissions and suspended items, when sustained,				5,169 37
Settled—July 2, 1847.				$78,202 37

JAMES E. BROOME,
Judge of Probates.

The foregoing account and vouchers are examined, and as audited are approved, allowed and admitted to record.

JAMES E. BROOME,
Judge of Probates.

JULY 2, 1847.

Which was read in evidence to the jury, and here the plaintiff rested his cause.

Defendants by their counsel then offered in evidence the entry of judgment in favor of the Union Bank of Florida against Martha Ann Manly, and Hiram Manly, in right of his wife, administrators of Samuel Parkhill, deceased, which judgment was founded upon the same cause of action as the present case—the execution issued thereon, and the report of the sale made under said execution, by John G. Camp, Marshal of the Middle District; and plaintiff admitted that the slaves so sold by Camp, Marshal, were to that extent, the identical slaves in the inventory mentioned—which judgment, execution, levy and report of sale are in these words, to-wit:

At a Circuit Court for the County of Leon, continued and held at the Court House in the City of Tallahassee, on Saturday, the 1st day of March, A. D., 1845. Present, the Honorable SAMUEL J. DOUGLAS, Judge.

The Union Bank of Florida, plaintiff,
vs.
Martha Ann Manly, late Parkhill, and Hiram Manly in right of his wife, Martha Ann, administrator of Samuel Parkhill, deceased, defendants. } In debt.

This day came the parties by their attorneys, and the plaintiff by his attorney filed his special demurrer to the defendant's rejoinder to the plaintiff's replication filed herein, to the defendant's amended plea *puis darrien* continuance, filed by leave of the court, on the 24th February last, in which demurrer the defendants joined: whereupon the matters of law arising upon the plaintiff's demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder and the matters and things therein alleged are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the said defendants. Therefore it is considered by the court, that the said plaintiff recover against the said defendant, the sum of $94,182 22-100, parcel of the debt in the declaration mentioned, and the sum of $27,982 65-100,

its damages, making together the sum of one-hundred and twenty-two-thousand one hundred and sixty-four dollars and eighty-seven cents, and its cost by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the said intestate, Samuel Parkhill, deceased, in the hands of the defendants to be administered, and the said defendants in mercy, &c.

THE TERRITORY OF FLORIDA.

To all and singular the Marshals of said Territory—Greeting.

We command you that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife, said Martha Ann, administrators of Samuel Parkhill, deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the 1st day of March, 1845, recovered in our Superior Court for the County of Lee, in the Middle District, as well for its debts as its damages occasioned by the detention of said debt; and likewise the sum of seven dollars and eighty-two cents, which to the said Union Bank of Florida in the same court adjudged for its costs by it in that behalf expended, together with lawful interest on said damages, from the rendition of said judgment till paid, and the costs of this writ and of your proceedings herein; and that you have the said sums of money before the judge of our said court, at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, clerk of our said court at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the independence of the United States the sixty-ninth year.

[SEAL] R. T. BIRCHETT, *Clerk.*

Came to hand 20th March, 1845, and levied on the following slaves:

[Here follows a list of slaves levied on, and a statement of the sale thereof by the marshal, for the net sum of $55,173 64.]

To the admission of which evidence, the plaintiff, by his counsel, objected, but the court overruled the objection and permitted the

same to be read in evidence; to which decision the plaintiff, by its counsel, excepted.

The said defendants, by their counsel, then offered in evidence nine mortgages executed by Samuel Parkhill in his life time, to the Union Bank of Florida, to secure his subscription of shares in the said bank, to wit:

Memorandum of Samuel Parkhill to the Union Bank of Florida, 19*th March*, 1835.

North East quarter Sec. 3, T. 1; East half North West quarter, Sec. 3, T. 1; West half North West quarter, Sec. 2, T. 1; South East quarter Sec. 34, T. 2, R. 2, North and East; East half South West quarter Sec. 34, T. 2, R. 2, North and East; West half North East quarter Sec. 34, T. 2, R. 2, North and East; South West quarter Sec. 35, T. 2, R. 2, North and East.

For fifty shares, 50.

1*st February*, 1837.

North West quarter Sec. 31, T. 1, R. 4, North and East; East half South East quarter Sec. 31, T. 1, R. 4, North and East; East half South East quarter Sec. 35, T. 1, R. 3, North and East; West half South West quarter Sec. 31, T. 1, R. 4, North and East; West half South East quarter Sec. 36, T. 1, R. 3, North and East. Slaves Hemady, Poll, Elias, Sarah, Hagar, Elizabeth, Sam, Johnny, Juba, Jane. For sixty shares, 60.

(*Note*—The land with 31 shares transferred to H. J. Mills.)

7*th March*, 1838. Remortgage of the property in the two preceding, mortgages for forty-one shares, 41.

(*Note*—13 shares transferred to H. J. Mills.)

16*th May*, 1838.

North East quarter Sec. 33, T. 2, R. 2, North and East; East half North West quarter Sec. 33, T. 2, R. 2, North and East; North West quarter Sec. 34, T. 2, R. 2, North and East; South East quarter Sec. 33, T. 2, R. 2, North and East; South half Sec. 34, South West quarter Sec. 35; West half North West quarter Sec. 2, T. 1, R. 2, North and East; North East quarter Sec. 3, T. 1, R. 2, North and East; East half North West quarter Sec. 3, T. 1, R. 2, North and East.

Slaves—Cæsar, York, John, Toney, Bristo, Frederick, Elias, Claiborn, Dick, Bob, Johnny, William, Old Tom, Ned, Albert, Dany, Frank, John, Sy, Lisbon, Ben, George, William, Primus, Ellick,

George, Jim, Tony, Harris, Toney, Cuff, York, Dick, Cuba, Amy, Grace, Abram, Rose, Malinda, Francis, Beck, Juba, Fillis, Chloe, Amy, Francis, Susanna, little Juba, Jane, Margaret, Frank, Mahala, Julia, Louisa, Rachel, Ellen, Matilda, Caroline, Celia, Maria, Nancy, Winny, Minica, Eddy, Kitty, Fillis, Hester, Amy, Israel, Sibby, Scipio, and Long Mary, for four hundred and seventy shares. 470.

(*Note*—105 shares transferred to the Prest. U. Bk. of Florida.)

16*th May*, 1838.

West half South West quarter Sec. 1, T. 2, R. 1, North and West; South half Sec. 2, T. 2, R. 1, North and West; South East quarter Sec. 3, T. 2, R. 1, North and West; West half North West quarter Sec. 3, T. 2, R. 1 North and West; Lot 1, Sec. 4, T. 2, R. 1, North and West; Lots 1 and 5, Sec. 9, T. 2, R. 1, North and West; North half Sec. 10, T. 2, R. 1, North and West; South East quarter Sec. 10, T. 2, R. 1, North and West; East half South West quarter Sec. 10, T. 2, R. 1, North and West; Fractional Sec. 11, T. 2, R. 1, North and West; Frac. Sec. 14, T. 2, R. 1, North and West; Frac. Sec. 15, T. 2, R. 1, North and West; Lot 1, Sec. 21, T. 2, R. 1, North and West; Lots 1 and 2, Sec. 22, T. 2, R. 1 North and West.

Slaves—John, William, Edmund, Wilson, little Wilson, Pitman, Sam, Henry, Rochester, Israel, Daniel, Richard, Tom, Eliza, Polly, Nancy, Matilda, Barbara, Spotswood, Peggy, Mary, Daniel, Penny, Rachel, Emily, George, Phil, Billy, Frederick, Hemady, Ned, Jack, Morgan, Anthony, Gully, Jack, Tom, Hackney, Tom Gander, Sam, Homady, Primus, Isaac, John, Dolly, Sarah, Hagar, Elizabeth, Fanny, Morgianna, Martha Ann, Mary, Molly, Margaret, Diana, Ellen Elizabeth, Sam, Sarah, for six hundred and ninety shares. 690.

(*Note*—93 shares transferred to the Prest. of the U. Bk. of Fla.)

20*th May*, 1838.

South West quarter Sec. 3, T. 2, R. 1, North and West; East half North West quarter Sec. 3, T. 2, R. 1, North and West; West half North East quarter Sec. 2, R. 1, North and West; Lot 6, Sec. 4, T. 2, R. 1, North and West; Lots 2, 3, 6, and 7, Sec. 9, T. 2, R. 1, North and West; Lot 8, Sec. 4, T. 2, R. 1, North and West; for one hundred and one shares. 101.

15*th May*, 1839.

Gabriel, William, Squire, George, Isaac, Jacob, Keeling, Jack, Moses, York, Albert, Adeline and child, Martha, Ann and two chil-

dren, Mary and child, Clarissa, Sarah and child, Billy, Mariah and child, Francis, Goodwin, Ann and child, Queen and child, Hannah, and child, Eliza, Emily, Rachel, Margaret, Fenton, Radney, Jane, Kitty, Judy, Patty, Jacob, Jim, Peter, Gabriel, Dick, Daniel, Harkless, Harriet, Walker, Willy, George, Nancy B. and child, Maria and child, Patsy, Cely, Nancy Burwell, for two hundred shares. 200.
January 15th, 1840.

Slaves—Sey, Kitty, for five shares. 5.
29th February, 1840.

West half South East quarter Sec. 29, T. 2, R. 3, North and East; South East quarter South East quarter Sec. 30, T. 2, R. 3, North and East; South East quarter North East quarter Sec. 30, T. 2, R. 3, North and East, for eight shares. 8.

19th March, 1835, ...	50	shares.
1st Feby., 1837, for 60 shares transfer 31 to Mills,	29	"
7th March, 1838, for 41 shares, transfer to Mills, 13	28	"
16th, 1838, 470 transfer to Pres. Union Bank, 105	365	"
16th May, 1838, 690 transfer to Pres. Union Bank, 92	597	"
20th May, 1838, ...	101	"
15th May, 1839, ...	200	"
25th Jan. 1840, ...	5	"
29th Feb. 1840, ...	8	"
	1383	shares.

Union Bank of Florida, 15th July, 1847.

C. G. ENGLISH,
Solicitor Union Bank.

To the admission of which evidence the plaintiff, by its counsel, objected, but the court overruled the objection and allowed the same to be read in evidence, to which decision, the plaintiff excepted.

The said defendants, by their counsel, then offered in evidence a deed of mortgage of certain slaves named in said inventories and appraisement,, executed by said Samuel in his life time, dated the —— day of —— A. D. 18 and proved that said mortgage was in suit

for foreclosure in this court, plaintiff's and counsel admitted that the same was assigned and in fact belonged to other persons than the Bank, which deed of mortgage is in these words:

This Indenture, made and entered into 19th day of October in the year of our Lord one thousand eight hundred and forty, between Samuel Parkhill of the county of Leon in the Territory of Florida, of the *first* part and the Union Bank of Florida, of the *second* part: Whereas the said Samuel Parkhill is justly indebted to the said Union Bank of Florida, in several sums of money as follows, to wit:

1. In a certain Bill of exchange dated 29th August, 1839, payable at ninety days after the fourth day of November, 1839, drawn on Hamilton & Co. of New York, in favor of William H. Brodie, for twenty-five thousand dollars, which bill, at request of said Parkhill, was not forwarded for acceptance and payment; and on which there is endorsed a payment of nine thousand three hundred and fifty dollars, as on the 22d February, 1840.

2. Also a certain note payable to order of John Parkhill, Esq., Cashier, dated 28th August, 1839, and payable at ninety days from the 24th October, 1839, for twenty thousand dollars, upon which note there is endorsed, July, 18, 1840, a payment of three thousand nine hundred and twenty-three 58-100 dollars.

3. Also a bill of exchange dated 8th February 1837, drawn on Hamilton and Cole, of New York, by William H. Brodie, in favor of and endorsed by said Samuel Parkhill, for the sum of ten thousand five hundred dollars, payable six months after date, which bill was accepted by said Hamilton & Cole, and protested for non-payment.

4. Also one other note dated 24th April 1839, for fifteen thousand dollars, signed by said Saml. Parkhill, and endorsed by William P. Craig, and payable eight months after date, upon which said note, the following payments are endorsed, to wit: on 21st January, 1840, the sum of ten thousand dollars, and on the 1st January, 1840, the sum of one thousand and ninety nine 35-100 dollars.

5. Also a bill of exchange dated 22d March, 1837, drawn by Wm. P. Craig in favor of, and endorsed by, Saml. Parkhill, upon Maitland, Kennedy, & Co., at four months after date, for five thousand two hundred dollars, which bill was protested for non-payment.

6. Also a certain promissory note dated January 4th 1840, payable to, and endorsed by R. H. Berry, payable ninety days after date, for fourteen hundred and forty three 58-100 dollars.

7. Also a certain note dated January 10th, 1840, payable to, and endorsed by, John Parkhill, payable ninety days after date, for the sum of six thousand dollars.

8. Also a certain other note dated 18th March, 1840, payable sixty days after date to the order of William P. Craig, and endorsed by him for the sum of ten thousand dollars.

9. Also a certain other note signed by said Samuel Parkhill, dated January 19th, 1840, payable ninety days after date, to the order of and endorsed by John Parkhill for the sum of five thousand dollars.

10. Also a certain other note signed by said Samuel Parkhill, dated February 1st, 1840, payable ninety days after date, to the order of, and endorsed by John Parkhill for five thousand dollars.

11. Also one other note dated October 19th, 1840, and payable to the Union Bank of Florida, or its assigns on demand, for the sum of thirteen thousand, two hundred dollars.

And whereas, the said Samuel Parkhill is desirous of installing the payment of said debts, notes and bills of exchange, so as to pay thereof twenty-five thousand dollars on or before the first day of April in the year one thousand eight hundred and forty-one, and to pay annually thereafter, on or before the first day of April in each succeeding year, the further sum of fifteen thousand dollars, until the whole of said debts with the interest thereon, shall have been duly paid and discharged. And whereas, the said Samuel Parkhill is desirous to secure the payment of said notes, bills and debts, at the times and in the sums before stated. Now this Indenture witnesseth that for and in consideration of the premises and in further consideration of the sum of one dollar to him in hand paid by the said Union Bank of Florida, the receipt whereof at and before the sealing and delivery of these presents, is hereby acknowledged, the said Samuel Parkhill hath granted, bargained, sold and transferred, and by these presents doth grant, bargain, sell and transfer unto the said Union Bank of Florida, and to its assigns, the following slaves, together with the future increase of the females thereof, to wit: Prisley, 40 years; Lucy, 45; Mary, 17; Asia, 40; Henry, 10; Susannah, 35; Nancy Eppes, 17; Nancy Dowdy, 18; Ailsey, 28; Francis Smith, 17; Melinda, 16; Lucy, 18; Priscilla, 12; Ann Eliza, 16; Rosetta, 14; Rachel, 16; Martha, 8; Phillis, 25, and child; Dick, 30; which before named slaves were mortgaged to the said Union Bank of Florida on the 6th November, 1839, to secure the payment of the first

described bill of exchange, for twenty five thousand dollars. Also the following other slaves and the future increase of the females thereof, to wit: Diana Clark, 24; Little William, 10; Martha, 9; Webb, 18; Irven, 18; Dick Petersburg, 17; Becky, 20; Edmund, 40; Patsey, 18; William Cary, 15; Henry, 11; Sarah Dawes, 15; Willis, 15; Jerry, 18; Henry, 18; Diana Brooks, 20, a daughter of Diana, 8; Black Ellen, 12; Smart, 35; Little Rosetta, 12; Gabriel, 12; Daniel, 12: To have and to hold the said slaves, unto the said Union Bank of Florida, and to its assigns forever: Yet upon this condition, that if the said Samuel Parkhill, his heirs, &c., shall well and truly pay the debts herein before described by payment of the several instalments described, at the times when the same shall become due and payable, then this indenture shall be null, void, and of no effect, else shall remain in full force and virtue. In witness whereof the said Samuel Parkhill hath hereunto set his hand and affixed his seal on the day and year first above written.

SAMUEL PARKHILL, [Seal.]

Signed, Sealed, and delivered in presence of
HENRY L. RUTGERS,
J. RICHARDSON, JR.

To the admission of which evidence the plaintiff by its counsel objected, but the court overruled the objection and allowed the same to be read in evidence to the jury; to which decision the plaintiff excepted.

The said defendants then called James T. Archer, who, being duly sworn in this behalf, deposed as follows, viz:

In consequence of an advertisement in the month of November, 1843, attended a sale before the banking house of the plaintiff, of (1428) fourteen hundred and twenty-eight shares of stock sold by the Union Bank of Florida—it was sold as the property of Samuel Parkhill, deceased, and was bid off by Col. John G. Gamble at one cent per share, premium; some directions were given at the sale, but does not distinctly recollect what they were. Being *cross-examined*, said, does not know whether the sale was ever completed or not, does not know what was done after that. Does not recollect the terms of the sale which were announced; it was cried by Henry L. Rutgers, an officer of the bank. Being *re-examined*, says, he was the attorney for the estate of Parkhill, and attended said sale as such, in

consequence of seeing the advertisement—does not know whether any credit was given to the estate on account of the stock.

Defendants then called Charles G. English, who being duly sworn in this behalf, deposed as follows: This statement which I have prepared as a statement of the original discounts for Samuel Parkhill on account of loans on pledge of stock, and the renewals of the same, of which the bond in suit is the last renewal, to wit:

Memorandum of Stock Notes discounted for

No.	Date of Entry.		Date of Note.		Note due.	
	7th April,	1835			22d January,	1836
1757	31st August,	'36	31st August,	1836	22d January	'37
2023	14th December,	'36	25th December,	'36	25th December,	'37
2199	26th January,	'37	25th Jan.,	'37	25th July	'37
2248	8th February,	'37	10 February,	'37	10th April,	'37
2569	8th May,	'37	13th April,	'37	13th August,	'37
3429	12th April,	'38	28th December,	'37	28th June,	'38
3962	17th July,	'38	17th July,	'38	17th October,	'38
4013	29th July,	'38	24th July,	'38	24th October	'38
4223	8th September,	'38	17th July,	'38	27th November,	'38
4236	15th Sept'r,	'38	15th Septem.,	'38	14th November,	'38
4264	22d Sept'r,	'38	22d September,	'38	22d October,	'38
4797	18th January,	'38	18th January,	'39	19th March,	'39
4883	5th February,	'39	5th February,	'39	6th April,	'39
4884	" "	"	" "	"	" "	"
5179	10th April,	'39	9th April,	'39	9th October,	'39
5180	" "	"	" "	"	" "	"
5181	" "	"	22nd March,	'39	" "	"
5352	15th May,	'39	4th March,	'39	4th November,	'39
6292	30th October,	'39	12th October,	'39	12th April,	'40
6293	" "	"	" "	"	" "	"
6294	" "	"	" "	"	" "	"
6460	13th December	'39	7th November,	'39	7th May,	'40
7319	8th May,	'40	15th April,	'40	1st June,	'40
7320	" "	"	" "	"	" "	"
7321	" "	"	" "	"	" "	"
7407	2d June,	'40	1st June	'40	1st October	'40
7408	" "	"	" "	"	" "	"
7409	" "	"	" "	"	" "	"
7410	" "	"	10th May,	'40	10th Septem.,	'40
7411	" "	"	4th June,	'40	4th October,	'40
7484	10th October,	'40	13th Septem.,	'40	" "	"
7868	7th November,	'40	7th October,	'40	6th December,	'40
7869	" "	"	" "	"	" "	"
7870	" "	"	" "	"	" "	"
7871	" "	"	" "	"	" "	"
7872	"	"	4th Otcober,	'40	" "	"
8047	1st January,	'41	9th December,	"	6th June,	'46
8043	" "	"	" "	"	9th September,	'41

S. Parkhill by the Union Bank of Florida.

Amount.	Discount.	N. Proc'ds	Date of Payment.	
3,334	Subs'ted for Prioleau's note 22d Jan. '36.			
3,333	267 43	3,065 57	26th January, 1837	Arrear of inte-
333 37	26 93	306 24	12th April '38	[rest 160 03
3,333	136 28	3,196 72	" " "	
4,000	56	3,944	9th May, 37	
4,000	112	3,888	12th April, '38	
7,666	631 21	7,034 96	5th February, '39	Arrear of inte-
50,000	1,044 47	48,955 53	" " "	[rest 317 76
12,300	256 93	12,043 07	" " "	
20,000	417 79	19,582 21	" " "	Int. from 27th
6,483 22	92 20	6,391 02	" " "	[Aug. 1838.
16,982 08	128 31	16,853 77	18th January, '39	
4,500	64	4,436	10th April, '39	
88,783 22	1,262 72	87,520 50	" " "	
7,666 17	109 03	7,557 14	" " "	
88,783 22	3,630 27	85,152 95	31st October, '39	
7,666	313 45	7,352 55	" " "	
4,500	201	4,299	" " "	
13,333 33	545 07	12,788 26	5th December, '39	
88,873 23	3,630 27	85,242 95	8th May, '40	
7,666	313 45	7,352 55	" " "	
4,500	184	4,316	" " "	
13,333	545 11	12,788 22	2d June, '40	
4,732 67	52 59	4,680 08	" " "	
88,783 22	986 45	87,796 77	" " "	
4,500	50	4,450	" " "	
533	14 70	518 30	7th November, '40	
4,732 67	130 43	4,602 24	" " "	
88,783 22	2,446 49	86,336 73	" " "	
13,333 33	367 40	12,955 93	10th October, '40	
4,500	124	4,376	7th November, '40	
13,333 33	74 08	13,259 25	" " "	
4,500	64	4,436	1st January, '41	
75,583 22	1,074 99	74,508 23	" " "	
13,333 33	189 63	13,143 70	" " "	
4,732 67	67 32	4,665 35	" " "	
533	7 95	525 05	" " "	
94,182 22	3,851 04	90,381 18		
4,500	274	4,226	26th August, '45	

Interest was always required to be paid in advance, but it was not always so paid in advance. Samuel Parkhills stock notes frequently lay over, as will be seen from the statement. Where a note would lie over for some time, and then be renewed, interest would be calculated from the maturity of the old note to the time of renewal, and then in advance upon the renewal for as long a period not more than twelve months, as the stockholder desired. *Cross-examined.* By this operation, the bank would lose the profit upon the interest so deferred. Discount is the counting off the interest, and there is a difference between interest paid in advance, and interest paid after the lapse of the time. The bank would lose by the operation upon the interest. *Re-examined.* Proves resolution declaring Parkhill's stock forfeited, to wit: Copy of Resolution adopted by the Board of Directors of the Union Bank of Florida at their meeting 1st November 1843: Resolved that the shares of stock standing in the name of Samuel Parkhill on the books of the bank are forfeited by non-payment of interest, and that the same be advertised and sold as directed in the amendment of the charter of the bank passed, approved on the 1st March 1839, and subsequently accepted by the stockkholders. Says that Rowlett's tables were always used by the bank; by those tables, the days less than a month are calculated at 360 days to the year, the year is composed of three hundred and sixty-five days, and the months are aliquot parts of the year.

Defendants then called Henry L. Rutgers, who being duly sworn, deposed as follows: He has attended to the business in bank of renewing stock notes—the bank required the interest to be paid in advance, and so took it whenever it could get it—stock notes frequently lay over —when such was the case, the interest was paid from the time the note fell due, to the time of renewal, and as much interest in advance as the party was willing to pay, not exceeding twelve months interest.

Interest is always calculated in bank, for convenience, by Rowlett's tables; by these tables, interest for days less than a month, is calculated at 360 days to the year. This is the only peculiarity. Does not recollect a case of an executor or administrator renewing a note in bank; if any such had been offered, would have applied to the President for instruction—stock notes or bonds are discounted, and the interest taken in advance whenever the bank could get it. *Cross-examined.* Says the notes of Samuel Parkhill frequently lay

over for some time—that pursuant to an advertisement, and under the amended charter of 1839, on the 18th November, 1843, the stock of Samuel Parkhill, consisting of thirteen hundred and eighty-three shares, was offered for sale, and knocked off to John G. Gamble, at one per cent. per share, he having thereby the privilege to secure the shares, which was never done. The stock still continues to stand at the credit of Samuel Parkhill on the books of the bank—Colonel Gamble, who bid off the shares, did not pay the one per cent. per share, neither did he secure the stock according to the requisitions of the charter: in other words, he did not complete the purchase. Witness produced copy of the advertisement, to-wit:

UNION BANK SHARES.

By order of the Board of Directors of the Union Bank of Florida, the following shares in the capital stock of said bank will be offered for sale at public auction, to the highest bidder, before the front door of the banking house of said bank, in the City of Tallahassee, between the hours of 11 o'clock, A. M. and 3 o'clock, P. M. on Saturday, the 18th day of November, 1843, said shares being forfeited under the amended charter of said bank, for non-payment of interest upon stock notes, viz: Samuel Parkhill, 1,428 shares.

JOHN G. GAMBLE, *President.*

Tallahassee, Nov. 2, (7,) 1843.

Re-examined.—Said there were forty-five (45) shares of cash stock which were not offered for sale—they still remain at the credit of Samuel Parkhill—the bank had loaned forty-five hundred dollars, the full nominal value on them. The stock offered for sale was bid off at one per cent. per share. Being asked if he had never said the bidding was for one cent. per share premium, answered he had, and by which he meant one cent per share, for the privilege of securing the nominal amount of the share by mortgage on lands and slaves. Being asked by defendant's counsel, if he had bid one cent per share for the shares, would be entitled to a transfer of the shares, on payment of the one per cent. per share bid, he answered no—he wuold have to pay the one per cent. share, and also secure the nominal amount of the shares by mortgage on lands and slaves, or pay the one hundred dollars per share, besides the one cent. That stock had been sold *bona fide* at 25 per cent. premium at sales by individuals, and sales on forfeiture by the bank—that in all the stock notes days of grace were added and the interest calculated, and as for four

days, and then were calculated by days. If the cash stock had been sold at one cent per share premium, the purchaser would have had to pay one hundred dollars, and one cent per share.

Again cross-examined.—Said the board of stockholders kept a record or minutes of their proceedings—the proceedings of each meeting were signed by the chairman and countersigned by the secretary. The book shown him is the record book, or minutes of the stockholders proceedings. Reads to jury the minutes or record of a meeting held 4th January, 1840, accepting the amendment of the charter, passed in 1839, to wit:

At a meeting of the stockholders of the Union Bank of Florida, held on the 4th day of February, 1840, pursuant to adjournment, Mr. James Gadsden submitted the following resolution: *Resolved*, That the stockholders do approve and accept as part of their charter the amendment thereof, passed by the Legislative Council, and approved by the Governor of Florida, in the following words, viz:

An act to amend an act entitled an act to incorporate the subscribers to the Union Bank of Florida, approved 1st March, 1839.

SEC. 1. *Be it enacted by the Governor and Legislative Council of the Territory of Florida*, That, if any stockholder who has heretofore or may hereafter obtain a loan upon the pledge of stock, as is contemplated in the twenty-ninth section of the act to which this is an amendment, shall neglect to renew or pay up his stock note, for the space of thirty days after the same shall have become due, the shares so pledged shall be forfeited to the bank, and any premium that may be received from the sale thereof shall accrue and be added to the surplus profits of the bank.

SEC. 2. *Be it further enacted*, That it shall be the duty of the Board of Directors, when any share may be forfeited as aforesaid, to proceed to sell the same at public outcry to the highest bidder, before the banking house in the City of Tallahassee, after giving ten days notice, by publication in all the papers published in Tallahassee, of the time and place of sale, and the purchaser shall, within ten days thereafter, execute to the bank the bonds and mortgages necessary to constitute him a stockholder, and be subject to the same rules, regulations and restrictions, and to be entitled to the same rights, privileges and immunities as are guaranteed to an original stockholder: *Provided*, That the sale and forfeiture of shares shall not operate to divest the bank of any lien which it may have had on

the property of the defaulting stockholder, but the same shall remain bound for the security of any debt he may owe the bank, whether as payer, endorser, or surety, until the same shall have been fully satisfied.

On this resolution, much debate ensued—after which, Mr. Richard H. Long called for the ayes and noes on its passage, when the following vote was taken:

Ayes—Messrs. R. W. Alston, R. C. Allen, J. G. Anderson, H. W. Barlow, T. A. Bradford, R. H. Bradford, Edward Bradford, E. E. Blackburn, S. J. Baker, Wm. Bailey, T. M. Bush, Bruton & Zeigler, T. P. Chaires, W. P. Craig, John A. Craig, J. W. Dabney, C. H. Dupont, A. F. Duval, F. Eppes, F. Fitzgerald, L. G. Gamble, Robert Gamble, James Gadsden, A. M. Gatlin, S. Parkhill, C. Rouse, H. V. Snell, J. B. Taylor, Richard VanBrunt, T. B. Watson, George T. Ward, J. M. Gilchrist, I. R. Harris, A. F. Holmes, John Judge, J. W. Lea, Thomas Livingston, J. H. T. Lorimer, Banks Meacham, J. C. McGehee, John Miller, J. C. McMillan, B. K. West, D. C. Wilson, W. Wyatt, A. Myrick, B. F. Whitner, Robert W. Williams.

Noes—Thomas Brown, R. Hayward, L. G. Lamb, Richard H. Long, M. C. Livingston, John N. Partridge, and Jacob Robinson, who voted in this our right as stockholders, and in virtue of their premises, the vote stood 10,027 votes for the resolution, and 353 votes against it.

Mr. Richard H. Long asked leave to file a protest against the resolution, which was granted.

Defendants then offered and introduced in evidence a judgment and execution in favor of Henry Bond, against Martha Ann Parkhill, administratrix of the estate of Samuel Parkhill, to wit:

At a Superior Court for the county of Leon, continued and held at the Court House in the City of Tallahassee, on Thursday, the 5th day of May, A. D., 1842. Present, the Honorable SAMUEL J. DOUGLAS, Judge.

Henry Bond, plaintiff,
vs.
Martha Ann Parkhill, administratrix of S. Parkhill, deceased, defendant. } In assumpsit.

This day came the plaintiff by his attorney, and the defendant being solemnly called came not: therefore it is considered by the

court, that the plaintiff recover against the defendant the sum of twelve thousand four hundred and forty-six and 14-100 dollars, the damages which the plaintiff has sustained by occasion of the defendant's intestate's non-performance of the promises and assumptions in the declaration mentioned, to be levied of the lands and tenements, goods and chattels of Samuel Parkhill, deceased, in the hands of the defendant to be administered, and his costs by him about his suit in this behalf expended, and the said defendant in mercy, &c.

[*Copy fi. fa.*]

THE TERRITORY OF FLORIDA.

To all and singular the Marshals of said Territory—Greeting:

We command you, as oftentimes before we have commanded, that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Parkhill, administratrix, to be administered, you cause to be made the sum of twelve thousand four hundred and forty-six dollars and fourteen cents, which Henry Bond lately, on the 5th day of May, 1842, recovered in our Superior Court for the county of Leon, in the Middle District, as well for his damages which he hath sustained by the occasion of the non-performance of certain promises and assumptions by the said Samuel Parkhill in his life time to the said Henry Bond lately made, and likewise the sum of ——— ———, which to the said Henry Bond in the same court adjudged, for his costs by him in that behalf expended, together with lawful interest on said damages, from the rendition of said judgment until paid, and the costs of this writ and of your proceedings hereon; and that you have the said sums of money before the judge of our said court, at Tallahassee, within 120 days from date, to render the said H. Bond the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, clerk of our said court at Tallahassee aforesaid, this 28th day of October, A. D., 1843, and of the independence of the United States the sixty-eighth year.

[SEAL.] R. T. BIRCHETT, *Clerk.*

[*Endorsed.*]

MEM.—This execution is entitled to a credit of seven thousand four hundred and ninety-two 46-100 dollars, as appears by the return on the *alis fi. fa.* returned to this office.

Test: R. T. B., *Clerk.*

By virtue of this execution, I have this day, 30th October, 1843,

levied on one hundred and two negro slaves, the property of defendant, a schedule of which is attached to execution No. 2,115.

J. G. CAMP, *Marshal.*

By A. A. FISHER, *Deputy Marshal.*

Defendants also called James E. Broome, Judge of Probate, who, being duly sworn, deposed that the commissions due defendant, Moseley, on the account of his administration, excluding the 184 slaves sold by John G. Camp was $377 76—if those slaves are to be considered as administered upon, then he will be entitled to commissions to the sum of $3,799 74. If all the property contained in the inventories is to be considered as chargeable for commissions, then the sum will be assessed at $4,807 26.

Defendants counsel then asked the plaintiff's counsel for an admission that the one hundred and eighty-four slaves sold by Camp were included in the inventories and appraisements exhibited, and also in the stock mortgages heretofore introduced—to which, with the additional fact that the defendants herein are now suing the purchasers for the same slaves, is assented to by both parties, and these facts to be considered as proved.

Defendant's counsel then moved to introduce the vouchers rejected by the Judge of Probate, viz: two receipts for payments made to Mrs. Martha Ann Manly, on account of her dower interest, and on account of James T. Archer, and to have allowance therefor, to wit:

Received, Tallahassee, 27th March, 1846, of W. D. Moseley, administrator *de bonis non* on the estate of Samuel Parkhill, deceased, five-hundred and sixty 24-100 dollars, on account of my wife's dower in said estate for the year 1845. H. MANLY.

$560 24-100.

Received of W. D. Moseley, administrator *de bonis non* of the estate of Samuel Parkhill, the following notes in part payment of my wife's dower out of said estate, to wit: Edward Houstoun, R. A. Shine, J. S. Bond's note for $352, with a credit by J. G. Gamble, of $129; L. H. Branch, Joseph Branch and E. Bradford's note for $80, credit by 9 90-100 dollars; Thomas Lang, John Hardin and W. S. Murray's note for $54, credited with $8; R. A. Shine, Edward Houstoun, and J. B. Bull's note for $176; R. W. Alston, Minor Walker and Thomas Gordon's note for 144 dollars, credited with 94 60-100 dollars; H. Bond, J. W. Argyle and W. F. Lloyd's note for $64; T. A. Bradford, E. Bradford and L. H. Branch's note for $20.

H. MANLY.

Received of William D. Moseley, administrator *de bonis non* of the estate of Samuel Parkhill, the sum of fifty one dollars on account of moneys paid by me to the clerk of Leon Circuit Court, for expenses and costs on appeals taken by the administrators to the Supreme Court of the State, 28th February, A. D. 1846.

JAMES T. ARCHER.

To the introduction and allowance of the payments made to Mrs. Manly, widow of said Parkhill, the plaintiff, by its counsel, objected because her allowance or share in the personal estate of said Samuel Parkhill had not been allotted and set apart to her as provided by law, but the court overruled the objection, and allowed the receipts to be read in evidence to the jury: to which the plaintiff, by its counsel, excepted.

Defendant's counsel then moved to introduce evidence under the said issue of *plene administravit* of the liability of defendants for counsel fees and expenses of the administration on the ground of a right of retainer to that extent, to the admission of which evidence the plaintiff, by its counsel, objected; but the court overruled the objection and ordered the evidence to be admitted; to which decision the plaintiff excepted.

And thereupon, under said decision, the defendants introduced Mollieus A. Long, who being duly sworn deposed, says he is aware of the services rendered the administrators by their counsel, in the following suits, to wit: The foreclosure suit brought by the bank against Mrs. Manly and her husband; was present at the trials in the Superior and Supreme Courts. He also knows of the detinue suits now pending brought by the administrators of Parkhill, said to be some twenty in number, for all which and other services he thinks the sum of three thousand or thirty-five hundred dollars, including the present suit, a reasonable charge.

Also Simon Towle, a witness duly sworn in this behalf, who deposed that certain suits for slaves had been brought in Louisiana, fifteen slaves in number, there were two purchasers of these slaves. Defendants are liable for costs of suits there, if they fail, and also for counsel fees: no sum of the latter has been agreed upon, would probably be some three or four hundred dollars if unsuccessful—if successful, it may amount to seven or eight hundred dollars.

Also John B. Keen, who deposed that the Clerk's office of the Circuit Court had claims for fees against defendants as administrators—two hundred dollars would cover the amount.

Union Bank vs. Parkhill's Admr's—cross writs of error.—Statement of Case.

Also recalled Judge Broome, who deposed that the defendants as administrators of Parkhill, were indebted to his office from two hundred to two hundred and twenty dollars; it is for fees in the audit of accounts.

And here the defendants rested their cause.

Plaintiff, by its counsel, then introduced the mandate of the Supreme Court reversing the judgment of the Union Bank of Florida, against Manly and wife, administrators of S. Parkhill, to wit:

STATE OF FLORIDA.

To the Honorable the Judge of the Circuit Court of the Middle Circuit of Florida in and for Leon County—Greeting.

Whereas, lately in the Superior Court of the Middle District of Florida in and for the county of Leon, before you in a cause between the Union Bank of Florida, plaintiff, and Martha Ann Manly and Hiram Manly in right of his wife, said Martha, administrators of Samuel Parkhill, deceased, defendants, the judgment of said Superior Court was in the following words, to wit: This day came the parcial demurrer to the defendant's rejoinder to the plaintiff's replication ties, by their attorneys, and the plaintiff, by its attorney, filed its special demurrer to the defendant's amended plea *puis darrien* conwhich demurrer the defendant's joined: Whereupon the matters of law arising upon the plaintiff's demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder and the matters and things therein alleged, are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the defendants. Therefore it is considered by the court, that the said plaintiff recover against the said defendant, the sum of $94,182 22-100 parcel of the debt in the declaration mentioned and the sum of $27,982 65-100 its damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands, and tenements, of the said intestate Samuel Parkhill, deceased, in the hands of the defendants to be administered, and the said defendant in mercy, &c., as by inspection of the transcript of the record of the said Superior Court which was brought into the Supreme Court of the State of Florida, by virtue of a writ of error, agreeably to the act of the Legislative Council of the Territory of Florida, con-

tinued in force in this State by the Constitution of this State in such case made and provided, fully and at large appears: And whereas, at the January term, in the year of our Lord one thousand eight hundred and forty-six, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof it was considered by said Supreme Court,, that the said judgment of the Superior Court for Leon county, to be reversed, annulled, and set aside, and that the plaintiffs in error recover against the said Union Bank of Florida, the defendant in error, their costs by them about this suit in this behalf expended, which costs amount to the sum of $25 89-100.

You therefore, are hereby commanded, that such proceedings be had in said cause as according to right and justice and the laws of the State of Florida, ought to be had, the said writ of error notwithstanding. Witness the Honorable Thomas Douglas, Chief Justice of said Supreme Court, at Tallahassee, this fourth day of May, A. D. 1846.

[Seal.] M. D. PAPY,
Clerk Supreme Court.

Also the judgment of the Circuit Court and dismissal of suit therein, to wit: At a Circuit Court for the county of Leon, continued and held at the Court House in the City of Tallahassee, on Saturday the 9th day of May, A. D. 1846: Present the Honorable George W. Macrae, Judge, &c

The Union Bank of Florida, plaintiff,
vs.
Martha Ann Manly, and Hiram Manly, in right of his wife, said Martha, administrators of Samuel Parkhill, deceased, defendant } In debt.

This day came the defendants by their attorney, and presented to the court here, the mandate of the Supreme Court of this State, to which an appeal had been taken by the defendants from a judgment heretofore rendered in this cause, by which mandate it appears that the judgment heretofore rendered in this cause was reversed, annulled and set aside, and that the cause be ordered to be remanded to the Circuit Court for Leon county, with directions to that court that such proceedings be had in said cause, as according to right and justice and to the laws of Florida ought to be had. It is, therefore, ordered that the judgment heretofore rendered in this cause in the Su-

perior court for the county of Leon be annulled and set aside, and that the said defendants, as administrators as aforesaid, recover against the said Union Bank of Florida their costs by them about their defence in this behalf expended, as well in the said Supreme Court, as in the said Superior and Circuit Courts, to be taxed by the clerk of this court.

The said plaintiff offered in evidence sixty-nine bonds of the Territory of Florida, issued and negotiated by the Union Bank of Florida, under its act or charter of incorporation, amounting to the sum of sixty-nine thousand dollars, being the amount for which the slaves of Samuel Parkhill, in the said nine stock mortgages, were held and bound; for the purpose of showing that the plaintiff had, by taking up the said bonds of the territory, relieved the property from any lien, real or pretended, of the said Territory of Florida upon the mortgages in question, or so much of the property specified and conveyed therein. The plaintiff admitting that the security on all lands and negroes in the mortgage mentioned was in *solido* and attached to all and every part of the same, and that the bonds offered were not the property of the bank, but held in trust by it for a creditor of the bank. But the court refused to allow said evidence to go to the jury—to which refusal, the plaintiff by its counsel excepts.

This being all the evidence introduced, and the cause having been fully argued to the jury, the said plaintiff by its counsel prayed the court to instruct the jury—

That the Union Bank, for itself, and as trustee, a depository of the territory, and for the security of the territory itself, hath, by virtue of the stock mortgages offered in evidence in this case, and of the act of incorporation of the Union Bank, and the acts amendatory thereto, a lien on the mortgaged property covered by the stock mortgages of Samuel Parkhill, not only for the nominal amount of the mortgages for stock, but also for the amount of the stock note or loan of two-thirds, made to the stockholder, Parkhill, on pledge of stock, and which is sued upon in this action, with interest on such stock loan, and, therefore, the property contained in the inventory, and included in the said stock mortgages, are assets in the hands of defendant Moseley, applicable to the discharge of the plaintiff's debt demanded in this action.

Which instruction the court refused to give, and the court instructed the jury as follows, to-wit:

1. That the capital of the Union Bank of Florida was raised through means of the territorial bonds—that these, though in form the obligation of the territorial Government, were in effect and actually bonds of the stockholders, the obligation by the Territorial Government being assumed as a means to effect their negotiation in the foreign market.

2. That the said bond and mortgage executed to the bank by the stockholder, are by the 8th section of the charter, intended to secure payment of the principal and interest of the bonds issued by the territory, and are in contemplation of law as if both bond and mortgage had been originally made and executed to the capitalist, or holder of the territorial bonds, by the stockholder. That so soon as the money was raised by sale of the bonds, the stockholder became debtor and bondholder, or capitalist, the creditor, the debt being secured primarily by the bond and mortgage of the stockholder, and again by the endorsement of the bank, and by the engagement of the territory.

3. That the bond and mortgage of the stockholder being payable to the bank, constituted the bank as agent and trustee to see principal and interest paid agreeably to the terms of the bond and mortgage. That so soon as the bank received the money, through the sale of the bonds at par, *eo instanti* the shares of stock were paid in full.

4. That the bank cannot, through a judgment and execution in its favor, divert the mortgaged property from the purposes and objects designed by the mortgage and the charter of the bank, and that a sale thereunder is in violation of its trust and illegal.

5. That the debt on which the present suit is founded is for a loan and though secured, like every other debt of a stockholder, by his shares, is not secured, either directly or indirectly, by the mortgage of the stockholder.

6. That an assignment of the bond and mortgage of the stockholder by the bank, in payment of territorial bonds, will entitle the assignee to coerce payment through a sale of the property, on the terms prescribed by the mortgage, and that the bank itself may enforce sale thereof in such manner and for such purpose, but that said property may not, except by consent of all parties, interested, be sold by the said bank in any other manner.

To all which said several decisions, rulings, judgments, instruc-

tions and refusals to instruct the jury, as prayed for by plaintiff the said plaintiff by its counsel excepts; and forasmuch as the said several decisions, rulings, judgments, instructions and refusals to instruct, do not appear of record, the said plaintiff by its counsel tenders this his bill of exceptions, and prays that the same may be signed, sealed and made part of the record, and it is done accordingly.

[SEAL.] THOMAS BALTZELL, *Judge.*

The defendants by their attorneys also excepted to various rulings of the court, which exceptions were noted in the following bill of exceptions filed by defendants:

On the trial of this cause, the evidence was offered and admitted or refused, and other proceedings had, in all respects as set forth in plaintiff's bill of exceptions, to which bill of exceptions reference is here made by consent, to avoid useless repetition.

Upon which state of facts and the pleadings, the court gave the following instructions, to which the defendants by counsel excepted, save the second:

1. That it is competent for a person obtaining a loan (on stock) to pay the interest in advance at the time of the loan, and such an arrangement freely and fairly made is not condemned or prohibited by the laws of usury, or by the charter of the bank.

2. That the stockholder under the 29th section was entitled to a loan equal to two-thirds the amount of his shares—in other words, was entitled to the entire sum, without a deduction of interest, at the time of the loan.

3. That it was competent for the stockholder, however, to waive his privilege of taking the entire two-thirds, and pay the interest in advance, as provided under the 28th section, and that such an arrangement is not illegal.

4. That if the jury are of opinion that such an arrangement was made with the mutual consent and approbation of the officers of the bank, and the stockholders, and became a custom and usage of the bank, thereby asserting and fixing such a construction that defendants are precluded by it, and cannot now complain of it.

5. There being no pretence that more than ten per cent. interest was taken under this contract, or that there was any corrupt or wilful design to take more than the amount allowed by the charter, there is no forfeiture of the interest, as provided by the law of usury, or of the principal and interest, as contended by the defendants.

6. That the taking interest in advance on the note sued on, except in pursuance of such wilful and corrupt design, was not illegal, and was not improper in this case.

11. That there was no disposition or sale of the stock by the bank, as provided by the charter, and defendant is not entitled to a set off therefor.

12. That if there was neglect of duty in making a sale as provided, it was matter for suit, and to be compensated in damages, and not the subject of set off or payment.

13. That the sale of shares by the bank was a cumulative remedy, and that it might elect either a suit on the note, or sell after forfeiture, and until satisfaction by one of the means, the note was not extinguished.

14. If the jury are of opinion that the arrangement of reserving interest in advance on the stock note, was not with assent and free accord of said Parkhill, but coerced from him by the bank, and submitted to as the only means of securing his rights under the charter, then the arrangement was illegal, so far as the exaction of interest was received in advance.

Defendants by counsel then moved the court to instruct the jury, as follows:

1. That plaintiff had not power in loans under the 29th section of its charter, being stock loans to stockholders, to deduct interest in advance, or discount bonds or notes; which was refused by the court.

2. That plaintiff had no power by its whole charter, and the general law of the land in force, pending the whole of its stock loan transactions with defendant's intestate, to take more than at the rate of eight per centum per annum interest in any case or in any manner, whether taken in advance or paid subsequently; which was refused by the court.

3. That interest on loans under the 29th section of the charter, could only be required to be annually paid up; which was granted.

4. That in calculating the interest due annually upon the stock loan of each stockholder, it was lawful only to calculate interest by the year, or proportions of a year; and if the jury believe from the evidence that at any time, at any of said stock loans or renewals for any number of days, or in discounting for days of grace, that interest was calculated by reckoning a day as the 360th part of a year, and

interest was so taken or deducted in the loan or transacted, that such calculation and taking or deducting was illegal; which was refused by the court, who gave in lieu thereof, "that in such case the excess of interest was illegal, and should be deducted."

5. That if the jury believe from the evidence that the bank, by taking interest in advance, upon any of the original stock loans which have resulted in and been consolidated in the paper now in suit, or by calculating a year at 360 days, took more than the rate of eight per centum per annum interest, that the plaintiff had no right by charter so to do, and cannot recover in this action; which was refused.

6. That the plaintiff's charter, is an enabling charter, and only gives power to do that which is expressly granted or necessarily implied in the granted powers. That plaintiff can do nothing which is prohibited, so as to give itself any right thereby; and that in all things done or attempted to be done by the plaintiff, which are prohibited by the charter, or power to do which is withheld or not given, either expressly or by necessary implication, such acts or attempts are without law or authority, and as to them there is no charter or corporation, and out of such acts or attempts no contract or cause of action can arise, and as to the same there is no party on the side of the corporation, capable of contracting or of bringing an action for violation of contract, and no suit can be instituted or recovery had, on any such act or attempt beyond the law of its existence and nature. And that there is no express grant and no necessarily implied power to take interest in advance upon stock loans, or in any wise or mode on such loans, to take more than at the rate of eight per centum per annum interest in the charter of the plaintiff; and on the contrary the taking of more than the rate of eight per cent. per annum is expressly prohibited.

Which was refused by the court.

7. That though by the general law in force pending these transactions, natural persons might take more than the rate of eight per cent. per annum, by expressing the same in the contract, yet in this case there is no evidence of any express agreement to give or take more than eight per cent. per annum yet the bank being entirely a creature of legislation, and expressly prohibited, could not take in any case, more than at the rate of eight per centum interest, and any attempts so to do could create no contract.

8. That any contract by the bank under the 29th section, taking

or reserving more than at the rate of eight per centum per annum, is usurious, and by the charter, each stockholder is entitled to a credit or loan fully equal to two-thirds the amount of his shares, and Parkhill's administrators are entitled to have a credit for all monies paid or withheld upon pretence of interest in advance, or beyond the rate of eight per centum per annum, together with interest on the same at the rate of eight per cent. from the time of such payment or withholding, and the same may be allowed either by way or recoupment under the plea of judgment or money had and received in the plea of set-off; which was refused by the court.

9. That by the 29th section of the charter, Parkhill, and his representatives after his death, were entitled to a loan equal to two-thirds the amount of his shares, to continue pending the existing of the bank, subject only to the proviso, that the note or obligation should be annually renewed, and the interest paid up: That this proviso does not make a condition precedent or subsequent to defeat the loan and render the same payable or recoverable by action thereon, upon the stock obligation, but is simply directory to the officers of the bank and the stockholder, and further operates as an agreement or covenant to pay interest by the stockholder annually, and in default thereof gives a right of action for such interest only or to sell stock.

Which was refused by the court.

10. The 9th being refused, counsel further prayed the court to instruct the jury—That if the proviso is to be considered as a condition, it could only be a condition subsequent to defeat the continuance of the loan, and if so, there were two conditions required, 1st—giving a note or obligation annually, 2d—paying up interest annually, and that the continuance of the loan could not in this case be defeated by failure to give an obligation annually, because that is rendered impossible by the act of God, in the death of Samuel Parkhill, and act of law, which renders his representatives incapable of giving a new obligation of a character to bind the estate, or constitute a proper legal renewal of Parkhills obligation. And that if the jury believe that at any time more than the rate of eight per cent. per annum has been intentionally taken by the bank upon this loan, or any part of it, embraced in the note in suit, then all interest is void and irrecoverable, and all obligation to pay interest by Parkhill or his representatives is done away with, by the act of the other party, and so there is in the case supposed no condition broken in this case to the contin-

uance of the loan, and it cannot be recovered; which was refused by the court.

11. That, if there has been a valid sale of Parkhill's stock, his representatives would in this action be entitled to recover its value as sold—and if there has been no valid sale, and Parkhill's representatives are still the owners of the stock, the bank cannot recover in this action upon the stock note, because the administrators could not renew the note, and upon payment of interest would be entitled to keep the loan—and to give a judgment for the principal would be to give judgment against them to recover that which they have a right to keep, the interest only being due to the bank; which was refused by the court.

12. That, by the second section of the amended charter, March 1, 1839, it became the duty of the bank to sell, on ten days' notice, the shares of any stockholder, which became forfeited under the first section of that act, and that the bank must show a compliance with this duty and the amount of sale, before it can sue on the stock note, and that the amount of such sale (except the premium) must be credited to the owner of the stock; which was refused by the court.

13. That the bank, after lawfully declaring Parkhill's stock forfeited, and advertising and selling to the highest bidder, (if the jury believe such was the fact,) diverted all interest of Parkhill or his representatives at the moment of such sale, and they were in no manner responsible for the conduct of such purchaser, and could not, either by his failure or compliance with the charter, become re-invested, without their own express consent, with the ownership of said stock, or responsible for any conduct of the purchaser, or bound to enquire into the same, but had a right to treat the said sale as legal, and to insist upon all legal consequences therefrom arising; which was refused by the court.

14. That, upon forfeiture, the bank was bound to sell, on ten days' notice, and if it failed so to do, was responsible in this action for the highest rate at which sales had been made, or at least the par value of the stock, unless they proved it to be then worth less han par; which was refused by the court.

15. That the restriction in the 28th section of the charter to the bank, not to exceed the rate of eight per cent. per annum, is the *"expression'* of the rate of interest which the bank could not exceed, when no other rate is mentioned, and as a part of every con-

tract (as a limit) the bank might make—and if it is not such an expression in this case, then no rate of interest is expressed, and the rate of eight per cent. could not be exceeded by the general interest law then in force; and if the jury believe this has been exceeded intentionally, (not by miscalculation or mistake,) then the defendants are entitled to recover all the interest paid since such excess was first taken; which was refused by the court.

To which refusals, the defendants by counsel excepted, and prayed that this their bill of exceptions might be signed and sealed by the court, and made a part of the record, which is done accordingly.

[SEAL.] THOMAS BALTZELL, *Judge.*

The plaintiff prosecuted a writ of error in this court, to reverse the judgment rendered in the Circuit Court, and assigned errors in conformity with the exceptions taken in the plaintiff's bill of exceptions.

The defendants also prosecuted a writ of error in this court to reverse the judgment, and assigned errors in conformity with the exceptions taken by them at the trial, and specified in their bill of exceptions.

The questions arising on the errors assigned by the bank, were first argued.

Thompson, in support of the errors assigned.

Archer, contra, contended—

That inasmuch as the verdict and judgment were in favor of the plaintiff (the bank), except as to the question of assets in the hands of the defendants, the only error assignable by the plaintiff is, that upon the pleadings and proofs in this case, the judgment should have been rendered for assets in hand, and not for assets *quando acciderint.* That all the other points raised in argument upon this assignment of errors, are irrelevant, and therefore, require no response.

2. That the lands and slaves mortgaged by Samuel Parkhill to secure his subscription for stock to the Union Bank, were by the charter secured to the possession of the stockholder, (Samuel Parkhill,) until the maturity of the mortgages, to be held as a fund to redeem the outstanding obligations of the Territory issued to accommodate the bank, and upon faith and pledge of these mortgages, and the property therein contained—That to allow these slaves and lands to be sold by the bank under judgment and execution based upon the stock note or any accommodation paper, would be a diversion of this fund and a destruction of the indemnity secured to the territory of Flori-

da—That therefore these lands and slaves, if in the possession of the defendants, are not assets in their hands liable for the payment of the stock note.

3. That the shares of stock pledged for the payment of the stock note cannot be construed to embrace the lands and slaves mortgaged by the stockholder to secure the ultimate payment of his subscriptions to the bank—That upon failure of the stockholder to pay his annual interest on the stock note, the charter contemplated a sale of his *shares* of stock, not of his *lands and slaves*—That according to the testimony, such sale of the *shares* was made in this case, and a premium bid for the stock.

4. That the amendment of the charter, (1839,) on which the plaintiff mainly relies to establish that the property mortgaged for subscriptions of stock, is liable to sale under judgment on the stock note, is not obligatory upon the stockholders—That the original charter is a contract, and contains no provision for its amendment or alteration and cannot be amended or altered by the Legislature, except by the unanimous consent of the stockholders—That unless there be authority in the *original charter* for amendments, no subsequent amendment can bind any stockholder who rejects the amendment; and if any reject it, it cannot bind the others, for it cannot be the law of the corporation unless it binds all.

5. That the deposit of sixty-nine Territorial Bonds in the registry of the court calling for $69,000, does not relieve the incumbrance upon these lands or slaves, created by the stock mortgages.—It is admitted that the lands and slaves are thus mortgaged *in solido* for about double that sum—if these incumbrances can be relieved in this mode so as to make the property subject to execution, based upon the stock note—Territorial Bonds to the whole amount should have been deposited.

6. That upon the proofs in this case, the finding of the jury as to the question of assets, was correct, and that by reason of any thing in the plaintiff's exceptions, the judgment ought not to be reversed.

Randall, for the Bank, in reply:

The object and purpose of the creation of this corporation were to promote certain ends, deemed beneficial to the public, viz:

I. The introduction of foreign capital into the country, and as consequences to result—

1. Greater extension and facilities to business.
2. Diminution of the rate of interest.
3. Increased facility to the State, of the power of taxation. These benefits were realized to the extent anticipated.

II. The *"bonus"* secured to the State by the 23d section of the charter. This last benefit, it is admitted, has not been realized—nevertheless, its promise was a part consideration to the territory for the franchise granted.

Principles of law applicable to this and other corporations. "It possesses only those properties which the charter of its creation confers upon it, either expressly, *or as incidental to its very existence.* These are such as are supposed best calculated to effect the object for which it was created." Opinion of Ch. J. Marshall, in Dartmouth College *v.* Woodward, 4 Con. R., 544.

These objects "are such universally as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration for the grant." Ibid.

Distinctive character of this bank, as compared with ordinary banks of discount and deposit—

First and great distinction. The stockholders paid in no money, on account of their subscription for stock. The capital of the bank was borrowed on faith bonds of the Territory of Florida, payable to and endorsed by the bank, on the sale of which the fund was raised. Bonds and mortgages by the stockholders on their lands and slaves were made payable to the bank, to cover the amounts of their subscription, and to an amount equal to that for which the territory issued its bonds. See 1st and 10th sections of Charter, Thompson's Digest, 284, 287.

By 11th section of the charter, Thomp. D., 288, the *bank*, and not the territory, was primarily to pay—although by the terms of the bond, the territory was *absolutely bound to the bondholders.* See 13th and 14th sections of the charter.

Second. Another provision distinguishing this Union Bank was, that the stockholders, on the faith of their subscription thus secured, were entitled to a loan of two-thirds of their stock shares. 29th section of Charter.

From a review of the whole charter it results—

1. That, though the faith of the State was pledged to raise the capital of the bank, yet the *loan,* which brought this capital into the

vaults of the bank, was negotiated and made by the bank, and its proceeds to be subject to the management of the bank, under the terms of its charter, and is resulting *negatively.*

II. The loan was not made to the State, nor to the stockholders of the bank *individually,* but to the corporation aggregate, the bank alone. See 1st, 10th, and 11th sections of the Charter.

III. That all mortgage securities taken by the bank, under terms of its charter, and contracts made in pursuance thereof, *belong to the bank exclusively, in every legal sense.*

1. Such pledges were taken to the bank alone.

2. They were to remain in custody and possession of the bank, by 9th section of charter.

3. By same 9th section, the bank could transfer, release and discharge them, substituting others—releasing old stockholders and their property and receiving new ones.

Thus, then, the bank had full control of these securities, with no power reserved to the State to direct its action. If there was any equity in the State to control or interfere with the subject, it was a latent equity, to be called into action by a suitable remedy, and not to be collaterally invoked by third parties.

If the bank was a trustee, it was a trustee coupled with an interest and free to act, unless controlled by a court of equity acting directly on the subject, and at the instance of proper parties.

But if it were possible that the mortgagors had any thing to do with the application of the trust fund, (if trust fund it is to be considered,) then finally we reply, *that payment, or tender to pay,* must precede the application.

Let the present defendants make payment, and its application will go, as they contend it should go, to the bondholders of the bank, and to the release and indemnity of the State.

The exhibition in court in this case of sixty-nine bonds, adequate to cover all the mortgaged property, and their tender in release of and indemnity to the State, prove this intended application.

The case before the court exhibits beyond question, that defendant's intestate was largely indebted to the bank on his stock loan, and for arrears of interest for many years—with an enormous floating debt, and only partially secured, on accommodation paper.

How is this large debt to be collected? By the forfeiture and sale of his shares of stock—say defendants—the only remedy secured to the bank, according to their agreement.

But the facts of this case, and the whole history of the bank, prove that this is no remedy at all. The shares now and for years, have been nothing worth—cannot be sold, on the terms of the charter. They could only be sold on the condition of a new stockholder substituting other mortgaged property of equal value in place of the retiring stockholder. None such can now be met with—for it would be incurring a burden, a liability, with no prospect of advantage or safety. Even the loan of two-thirds of the amount of stock could not now be secured to the new stockholder, if he was willing to take it—for that yet remains with the defaulting stockholder, not collected, and not collectible, *say defendants,* until the expiration of the charter.

We say that the forfeiture and sale of the *"shares,"* provided for in the 29th section of the old charter, and by the amendment of 1839, necessarily involves and carries with it the forfeiture of the property, real and personal, mortgaged to secure these shares.

This amendment of 1839 is said not to be valid or binding, although accepted by a large majority of the corporation, at general meeting of the stockholders. On principle and authority we affirm the contrary. The powers previously imparted to the company made it a legal being, an equity and a unit—acting not through the agency of its individual corporators, but in its aggregate and corporate capacity.

Its consent then to the amendment being expressed in the mode pointed out in the charter, binds and concludes as well as those assenting to, as those dissenting from, the amendment.

Samuel Parkhill, defendant's intestate, in his life time voted with the majority to accept this amendment. Angel & Ames on Corp. p. 280, and cases cited. Witshul *v.* Gaither, 6 T. R. 388. Ex parte Rogers, 7 Cowen, 530, note.

And now the main question which I have to discuss, properly arises, and that is:

Whether on failure of any stockholder, to renew his note or bond for his stock loan, and to pay the interest due thereon—and after a judgment at law upon said bond or note, it is competent for the bank to subject the mortgaged premises to execution in satisfaction thereof?

1. We hold that such a resort is indispensable to preserve the very existence of the bank, to enable it to observe its faith and obligations to the State, to its bondholders and general creditors. It is only necessary to sustain the negative of this proposition, in the present

case, and in two or three more even of less magnitude, to wind up and close the institution in bankruptcy and ruin.

The very end and object of its creation would be defeated by such a principle of construction. For unless the bank can collect its debts, it is obvious it cannot discharge its liabilities. Invoking here the principles announced by the Supreme Court of the United States in the Dartmouth College case—quoted in the outset—as applicable to the construction of charters,

2. We proceed to the special facts and law of this case.

The bond in suit is for a loan obtained by defendant, Parkhill, in his life time, under the 29th section of the charter—and "on a pledge of his shares of stock." And now what does this *pledge* mean?

In ordinary banks, a pledge and forfeiture and sale of "shares of stock," when those shares represented money paid, would insure a full satisfaction of the debt.

In the Union Bank, unless the term "shares of stock," carry with it and involve also, "the property pledged" to secure those shares, the forfeiture and sale of the shares simply and alone, as was attempted in this case, secure to the bank *no return whatever.*

That surely was not the design of the charter. By the 29th section, the stockholder can only obtain a loan by giving and renewing his notes, &c., *"for the repayment of the money annually, and having paid the interest up."*

If he do not pay the interest up, he cannot renew his note or bond. At maturity if not renewed, is it not due and payable—principal as well as interest? How can this result be avoided? But on the other side, it is said the loan is permanent to the end of the charter.

Now this we deny—and we challenge the production of a line or word in the charter which can sustain such an assertion.

The 29th section speaks no such language—imports no such privilege.

The *loan* is not to exceed one year. It is then limited. It is to be made upon condition precedent of renewing note and paying up interest.

It is then not *absolute*—the right—but *conditional.* Being then a loan for one year, when past due and not renewed or paid, what is to become of it? May it not be sued for and recovered? So the court below decided and gave us a judgment. But how is it to be satisfied?

It is in evidence in this cause, that except the property mortgaged to this bank, Parkhill's estate has none other, is utterly insolvent.

Why then may not the plaintiff, the judgment creditor, holding this very property mortgaged to secure this very debt, apply it to its satisfaction?

We know of no principle of law or equity without the charter, to prevent it.

If it is right to do so, be kept in abeyance, be suspended to the end of the charter, its final resort will be utterly valueless.

And now looking to the terms of the charter in this connection, and particularly of the 9th section, we confidently assert:

1. That at their own creation "the shares of stock" and "the mortgaged property," which secured them, were intimately blended, and formed one subject of property, were in fact convertible terms.

2. That when *loaned* on the terms and conditions of that section, by the substitution of money—of *cash* for property—the loan contracted on the faith of this subject, attached not to the "shares" alone, but to the "property." The words "such loans as may have been made on the faith of it," refer for their antecedent to the word "property" in the line above—the word "property" is the only antecedent.

This 9th section preceding the other sections which bear upon this point, furnishes the cardinal rule of construction to them all, and to be made sensible, they must be made consistent therewith.

Now refer to the 22d section and it will be seen that to secure any remedy for the debt of the retiring stockholder, this same identity of "shares" and "property mortgaged," must be maintained; we see by that section that while the shares pass to the new stockholder, the *lien* for the *debt* attaches to the property pledged by the old or retiring stockholder.

See next the 26th section and note the terms "mortgages for loans" as there used. They are said to be "for loans given by virtue of this act." Then the "mortgage" is by the very terms of the act, to secure the "loan" as well as the "stock or bond."

How utterly does this reading repudiate the notion on the other side, that the mortgage was given only to secure the latter, the stock bond or note—while the "shares" alone were held to secure the loan.

The 27th section sustains our construction also. "Any individual who shall have obtained from said bank 'a loan,' secured by mortgage," &c. The term "loan" here is generally used, and applies as well to "stock loans" as others.

In answer to the position advanced on the other side, that until the expiration of the charter, the *interest* only, and not the principal of the loan can be collected by the bank, let the 22d section be again referred to; and it will be seen that, in cases of default of payment, "the debt," the whole debt, and not mere "interest" is recoverable, and that upon *"failure of payment,"* and not at the end of the charter.

This critical analysis of the charter, then, leads to the same conclusion, that an inquiry into the spirit and object of the institution, and the means essential to its successful operation, if not to its very existence, would conduct us; and we respectfully suggest to the court, that convinced, as they must be, of the necessity of the resort to secure payment, for which we contend, the judicial eye of the court should be directed to the charter, with a view favorable to the construction for which we contend. But we ask for no strained or forced construction, but that their ordinary meaning be given to ordinary terms.

An objection has been made to the use by the bank of Rowlett's tables for the computation of interest. A full and satisfactory answer to that objection will be furnished by my associate counsel, Mr. Thompson.

Another objection and ground of defence has been taken to our recovery, on the ground of the practice of the bank in exacting *interest in advance, or by way of discount,* as in this case, on stock loans. That objection, too, will be more fully considered and answered by Mr. Thompson. But I may here briefly state, that the only section in the charter which regulates the rate of interest, the 28th section, gives the power to the bank of deducting the interest in advance, both upon *"loans and discounts."*

Moreover the uniform practice from the beginning of the bank—the acquiescence of all parties, and the fact that it was adopted in good faith, being a provision against the interest of stockholders, and in favor of the territory and creditors of the bank—make it a matter of public policy to sustain the usage if possible. Nay, to allow one of the corporators to escape from his debt on this ground, would be to offer him a premium for his own error or misconduct, and at the expense of honest creditors.

This cause was further argued on the questions arising upon the errors assigned by the defendants.

Brockenbrough, for the administrators:

1. To prove the plaintiff's case, it must show *a grant.*

The corporation is extinct. This bank was incorporated by the act of the Governor and Legislative Council of the Territory of Florida, on the 13th February, 1833—amended on the 14th February, 1835—again in 1836, and March 1, 1839.

By the 15th section of the act, 1833, it is created a body politic and corporate, for and during the term of *forty years* from the passage of that act.

By act of Congress, 3d of March, 1845, Florida was declared to be a State of the United States of America, and thereby admitted into the Union on equal footing with the original *States "in all respects whatsoever."*

The question is, whether the corporation did not perish on the 3d of March, 1845, notwithstanding its forty years' grant? To determine this, we must look to the power of the *grantor.*

The grant was made by the Governor and Legislative Council.—The first act of the establishment of a Territorial Government, March 30, 1822—3 Story's Laws, 1828—invests the power of legislation over all rightful subjects of legislation—not violating the laws or constitution of the United States, or the right to religious freedom—in a Governor and thirteen discreet persons, to be appointed annually by the President, by and with the consent of the Senate.

The act of 3d March, 1823—3d Story, 1902—made no alteration in this respect.

The act of May 15th, 1826—3 Story, 2025—only altered this system so far as to make the council elected by the people, instead of the President and Senate; and all subsequent acts have not changed the investiture of the powers, but only added to the numbers of the council, and erected it into two houses, and in *all,* the unlimited power of repeal is reserved to Congress.

The question will not be made, whether this legislative power could grant a charter to a bank, to be valid during the Territorial Government. But the power to make such a grant, to exceed the territorial life, is denied, as a general proposition, and specially with regard to Florida.

Assuming this power to be as great as the power of Congress over Florida, (and it could not be greater)—let us suppose that this grant has been made by the same charter, directly by act of Congress

with or without the power of repeal, which was reserved over all acts of the Legislative Council, the act or grant must be held repealed and annulled, by the admission of the State upon an equal footing with the original states—or in other words, the grant of forty years must always have had the implied and necessary limitation going with it, "provided the territory shall so long continue"—because, in addition to the great questions of right and of constitutional law, the whole charter shows that the existence of the territory is incorporated with its own existence in every fibre, and is absolutely necessary to it. The one could not be destroyed without the other. The 25th section, providing for exemption from taxation, manifestly considers the existence of the territory and continuance of the charter as *co-terminous.*

Apart from all reserved and implied power of repeal or implied limitation in the grant, the very act of admission must annul the grant. States cannot be admitted, except on an equal footing with the old States. Congress has power to make all needful rules and regulations respecting the territory and other property belonging to the United States—and conceding that this gives control over all rightful subjecs of legislation it does not follow that *that power and right* extends over a sovereign State, and that sovereign power can be exercised and franchises and privileges granted away, which belong to the people, for a longer time than the power over the Territorial Governments continue. Congress cannot grant such a privilege in the body of a single State, therefore it cannot grant such a privilege in a territory, to continue over after the State becomes sovereign and is admitted. If so, the States would not be on equal footing. If this franchise could have been validly granted in Florida, to continue now, why might not all the privileges, and franchises and rights of the people have been granted away—and if for forty years, why not forever? If the hands of the people, or their legislature when sovereign, can be tied by contracts of Congress, made whilst they were in pupilage and had no right to consent, in any one paricular, why not in all?—where is the line of limitation? They considered these franchises important in the State constitution, and were very strict with the State legislature in regard to them.

In Permoli *v.* First Municipality, 3 Howard, 610. in which it was contended that religious liberty, secured by the ordinance of 1787, extended by Congress to Louisiana, was violated by laws and ordi-

nances of the First Municipality of New Orleans, it was held by the Court, that those acts were in no further force than part of the territorial law of Orleans—and so far as they conferred political or civil and religious rights, the laws of Congress were all superseded by the State Constitution, and none of them were in force, only so far as the constitution adopted them as laws of the State. Can this grant be in force in Florida, then?—or are all acts of Congress only null, which called to aid the political rights of the citizens, but *omnipotent*, when granting away their franchises?

In Polard's lessee *v.* Hagan, *et al.*, 3 Howard, 228-'9 the Supreme Court United States says: "Alabama is, therefore, entitled to the sovereignty and jurisidction over all the territory within her limits, subject to the common law to the same extent as Georgia was, &c. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on equal footing with the original States, the constitution, laws and compact to the contrary notwithstanding."

In the same case, 223-'4, after showing that Alabama, on her admission, succeeded to all the rights of *sovereignty, jurisdiction* and *eminent domain*, which belonged to Georgia before the cession, and that by agreement the United States retained nothing but the public lands—and that if an express agreement and stipulation had been inserted, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been inoperative and void, because the United States has no authority to take or exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except when expressly granted by the constitution of the United States, the court concludes thus: "The right of Alabama and every other new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union, must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands." That case decides, in the face of the compact, giving all waste and unappropriated lands to the United States, that the soils and shores of navigable rivers belong to the State, in virtue of its eminent domain and municipal sovereignty.—To whom, then, shall the franchises of the people, which *they* have never conveyed away, belong?

If an express stipulation could not confer upon Congress the power

of municipal legislation, or to grant away the common property of the people within the body of a State, how can it make such a grant without stipulation?

But independent of any general reasoning upon this subject, applicable to all territories, Congress could not grant away any of the franchises of the people of Florida for a longer term than its own temporary powers of government. It is inhibited by the supreme law of the land, the treaty of 1819, from so doing.

It is true that, by the 2d article of that treaty, His Catholic Majesty cedes the Floridas in full property and sovereignty. But this is of course subject to the subsequent stipulations in the treaty, which show that though the property and sovereignty was full, it was *temporary* in its nature, and upon *condition* of its being made a *State as soon as possible*, and in conformity with the principles of the Federal Constitution.

The 6th article, 1 Elliott's Diplomatic Code, 420, (on the Spanish side, which is very different from the English side, but which Spanish side is the correct one, to look to, to see what the United States engaged to do in behalf of the subjects of Spain then transferred, and being the language of the party granting, is to be taken most strongly againt the grantor,) stipulates that the inhabitants of the territory which His Catholic Majesty cedes by the treaty to the United States, "shall be incorporated into the union of the same States *as soon as possible*, according to [or in conformity with *'legun,*] the principles of the Federal Constitution, and admitted to the enjoyment of all the *privileges, rights* and *immunities* which the citizens of the other States enjoy." The Spanish side makes admission as soon as possible, and applies the principles of the Federal Constitution to the terms of admission, *not the time*, as in the English side.

This admission as soon as possible in conformity to the principles of that constitution, must mean as that constitution requires, upon an equal footing with original States—and especially when coupled with the subsequent part of the same article, which not only secures admission of the State upon an equal footing, but that the inhabitants each and all shall be admitted to the enjoyment of all the rights, privileges and immunities which the citizens of the other States enjoy.

Can this claim be complied with, if a portion of their rights and

privileges are previously ceded away by Congress, or its agent, the Territorial Government? The other States are privileged—have immunities, which secure them from such grants by Congress—has Florida, if this grant still continues?

But it follows, also, from this article, that the government of Congress was temporary—it never had perpetual power. It in the act of taking, guaranteed full State's sovereignty unimpaired to the people of Florida, and the full privileges of the people, as soon as possible. Could they in 1833, fourteen years afterwards, cede away those privileges for forty years? It was a violation of the obligation of contracts, of the treaty with Spain, and the constitution of the United States, if such result was intended. That treaty was supreme law. Florida could not violate it in her constitution—could the Territorial Legislature do more than a sovereign State?

This charter was a grant—a contract executed—all the cases in the Supreme Court have gone upon that position, and because they were *grants,* they have been held inviolable and unsusceptible of repeal. If such was the case, and this grant extended beyond the 3d of March, by virtue of the acts of Congress and the territorial grant, it follows now that it cannot be repealed, or altered, or modified by any power, for its whole term of forty years; for Congress has lost all power of repeal, and the State never has acquired it, if this charter exists by *right paramount to the State Constitution and laws.*

All these franchises, privileges, immunities granted are *property,* and have been held inviolable by a State, when validly granted, because they were *property.* However shadowy may have been the interest of the grantee, though a mere naked trustee, without the slightest beneficiary interest, these franchises have been held to be property, and where valid, contracts irrevocable.

The franchise and privilege in question was one, existing in Florida, to be exercised in Florida, it is carried out of the mass of the privileges of the people of Florida and ceded away—whose property, then, was it that was given away?—not the property of the United States, but of the people of Florida. *Their* rights, privileges, and immunities were ceded to certain persons.

It matters not for this argument how omnipotent may have been the powers of Congress, they were but *temporary.* This power to grant was either a part of the sovereign power of the State, with which Congress cannot be invested by treaty with Spain, or other-

wise, or it was not. If it was *not,* then the grant was void now that the State exists, because none but a sovereign power can grant away the privileges of the people and create corporations. If it *was* one of those sovereign powers of the State, it belongs to the State the instant it is formed and in full perfection, and the grants of the temporary government cannot continue a moment, because if they could then Congress might make such a grant in the body of a State, which is absurd.

If the United States succeeded to all the rights of the King of Spain, that power was but temporary, and could not be exercised beyond the limited time, without violation of the treaty.

But in Pollard's lessee *v.* Hagan, et al., 3 Howard, 225, it is said "it cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives, and much less can it be admitted that *they* could have *capacity* to receive or power to exercise them." Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. See Vattel's Law of Nations. And the Court declared a grant invalid, made by the Union ,in Alabama, because the sovereign powers of the King went to that State, and not to the Union.

Suppose this grant for forty years, made on the 2d of March, the day before the admission, it would have been held by all invalid and a fraud upon the right of the State. A person who has an estate for life, or other uncertain interest, may make a grant for years, because it is a lesser estate, but it is only valid during the continuance of the uncertain estate.

If this charter had been granted on the 2d of March, and could have been therefore valid on the 5th, why might it not have been granted on the fifth; and what difference can there be in a grant made to take effect in a State which you are bound by treaty to admit untrammelled, and in a State already admitted.

It is stated by Kent, (1 Com., 384,) in a note in his commentaries, that it was decided in the State *v.* New Orleans Navigation Company, 11 Martin, 309, that a territory could grant a charter binding on the State. No such proposition seems to have been made or decided. The positions were, that Congress had no right to establish a Territorial Government, and if so, that such government could not

grant such a charter, and that the charter in that case was void, because repugnant to the acts of Congress—all of which the court decided in the negative. But the position that Congress could not make such a grant, to exist beyond the Territorial Government by its own powers, has never been decided.

Chancellor Kent also refers to Williams *v.* Bank of Michigan, 9 Wendell, 540, 566, as deciding the territories may incorporate a bank, but it decides nothing more—the question for how long is not settled.

The power was given in that case to adopt such laws of the original States as in their judgment were necessary and suitable to the circumstances of the district, and it was decided they might make similar laws.

It is contended upon these grounds, that the grant necessarily terminated *ipso facto* by the admission of Florida. If this doctrine be correct, it follows that, on the 3d of March, 1845, the bank expired—that it could live no longer by virtue of its original grant, and it is, therefore, incumbent on the bank to show some new power perpetuating its existence—some authority from the State preserving its life, and this must be something more than a mere implication, it must be equal to the positive *grant*. There is no such grant to be found in the constitution or laws of the State, and every inference to be drawn from them is the other way.

The only clauses which have ever been quoted as continuing this corporation, as a grant, is the 14th section of the XIIth article of the constitution, which gives the General Assembly power, at its first session, to regulate, restrain and control all associations claiming to exercise corporate privileges in the State, so as to guard, protect and secure the interests of the people of the State, not violating vested rights, or impairing the obligations of contracts. This is utterly inconsistent with the idea of a previous *grant*, which could not be disturbed in any particular, without consent of the grantees. It is also not a *grant itself*.

The only legitimate construction of this article is, that the Legislature may, at its first session, make such disposition as it may think proper, concerning "associations claiming to exercise, &c.," necessary to protect the interest of the State, not violating rights and property and contracts previously vested in such corporations. But this is no enactment or grant or any particular corporation, or acknowledgement of the existence of any one.

The next clause quoted to sustain this bank, as a grant, is the last clause of section 1 of Article XVII, which declares that nothing in this constitution shall impair the obligation of contracts, or violate vested rights, either of individuals, or of associations claiming to exercise corporate privileges in the State." This, doubtless, relates to contracts with corporations and rights vested in them, which it was necessary to save, because the corporations themselves, the franchises, were to go by the board, by the act of admission. At all events, they are not words of grant—they give away none of the privileges of the people, or the state.

They do not continue alive contracts terminated, rights before divested, and corporations already dead. They only declare that the constitution shall not violate contracts, and which it does not. But neither does it preserve alive grants which expired the moment it came into existence; but it is held by some, in despair of fixing this charter upon the State, as a contract, that it is a *law*, and that it is in force by virtue of the first part of the 1st section of the XVIIth article of the constitution, which declares "that all laws and parts of laws now in force, or which may be hereafter passed by the Governor and Legislative Council of the Territory of Florida, not repugnant to the provisions of this constitution, shall continue in force until by operation of their provisions and limitations, the same shall cease to be in force, or until the General Assembly of this state shall alter or repeal the same."

If it is *a law*, it has been always and always would continue to be subject to repeal. As a law, it is repealed by the act of Congress which admits Florida upon the same footing as the original States. As a *law*, it is not in force by its own provisions and limitations almost every one of which require the continuance of the Territorial Government.

As a *law*, it is not in force, because repugnant to the Constitution. Almost every clause of the 13th article entitled "Banks and other Corporations," is wholly repugnant to this bank, and seem in effect to have been aimed at it, and intended to provide expressly against the existence of such an institution in the State, and now the same instrument is invoked as a new grant of the same charter. The 6th section alone of Article XIII is wholly repugnant to the charter of this bank—"Capital shall be created by actual payment of specie therein, and no bank shall borrow money to create or add to its capi-

tal, or to conduct its business, and no loans shall be made on stock." The whole capital here, is borrowed and the very life of the bank is loans upon stock. Again, the whole charter absolutely requires the existence of the *Territory*; the State cannot substitute itself, if it is a contract, and has not done so if it is a law. But the bank cannot live without the territory which is incorporated as a part of it—and an essential part, without which it cannot exist. See King *v.* Possmore, 8 Tenn., 241-242-3-245-248. Charter U. Bank, Sec. 16 & 30. Duval's Compilation. When any integral part of a corporation is gone, it is dissolved—a corporation dissolved is dead, and treated in court as a dead man. Morrison *v.* the Potomac Co., 8 Peters, 208.

Mr. Brockenbrough further argued that under proper constructions of the charter of the bank, and under the facts in this case, the instructions asked by defendants, and refused by the court, as set forth in defendant's bill of exceptions, should have been given the jury.

Thompson for the Bank:

1. The first position assumed by counsel of plaintiff in error, and which it is claimed arises upon the judgment of the court below sustaining the demurrer to the seventh plea, is this:—That there is no such corporation as the Union Bank of Florida now existing and capable of suing.

It is admitted that the act of incorporation passed by the Governor and Legislative Council of the Territory, in 1833, was a valid exercise of power, and that it continued legal and valid up to the 3d March, 1845, when it is contended it expired with the power which called it into existence. The Territorial government it is contended, was a power dependent on Congress and existed but for temporary purposes, and could not make a grant to survive and continue beyond the period of its own existence. That the admission of Florida into the Union operated as a constructive repeal of the charter.

It seems to me that when the power of the territorial government to make the grant is conceded, the question of the existence of the corporation beyond the period of the existence of the government is conceded with it.

The Territorial government was but temporary, it is true; still it was to continue until, by the terms of the treaty with Spain, of 1819,

it was admitted into the Union of the States. Its duration was indefinite, too, yet while it continued it must have possessed the ordinary powers of a government to have made the grant; and if contracts grow up under the government, surely a change in its mere form, or the person of the ruler, will not work an abrogation and destruction of such contracts.

That a grant of the powers of incorporation forms a contract is fully maintained in the Supreme Court of the United States, (Dartmouth College *v.* Woodward, 4 Peters' Cond. Rep., 517-8.) And it is also maintained in that case that the American Revolution did not at all affect the grant of the powers of incorporation to the College made by the British Crown. See pp. 552, 583, 584.

If such be the rule in case of a revolution, in which the former government is put down and abolished by force, surely it cannot be contended that a mere change of government, when the essential form of the State remains unchanged, can have a more injurious effect upon rights acquired under a former government.

The case of Permoli *v.* the First Municipality of New Orleans, 3 Howard's Sup. Court Rep., 609, decides only that the laws of Congress organizing the Territory of Orleans were repealed by the act of admission of the State of Louisiana. This is not doubted. So, also the laws of Congress organizing the Territorial government of Florida were repealed by the act admitting Florida into the Union, passed 3d March, 1845; yet no contracts or rights which became vested under those laws were destroyed by the repeal.

The case of the State *v.* the New Orleans Navigation Company it seems to me does go further than the counsel for plaintiff in error was willing to admit. The company was chartered by the Territorial Legislature and, after the admission of the State into the Union, it directed a *scire facias* against the company and sought to deprive it of its rights. It is true that the principal ground assumed was that the former government had no power to make the grant, yet if there had been any force in the point now made it could not have escaped the notice of the able counsel and court there. At any rate the Supreme Court of Louisana maintained that it was a valid and existing grant at the time of decision. See 2 Condensed Louisiana Reports, 203.

But it is contended that there is a difference between the Constitutions of the two States, that of Louisiana providing for the validity

of contracts of the State as well as of individuals under the Territorial government. Our Constitution is fully as broad, as we contend, for it provides for "all contracts;" and it is, also, careful in excluding the idea of the violation of any right by the provision of the 1st section of the 17th article: "And nothing in this Constitution shall impair the obligation of contracts or violate vested rights, either of individuals or associations claiming to exercise corporate privileges in this State." See Thompson's Digest, 8. This, it seems, should be conclusive. The form of government was changed by the Constitution, and that instrument was not to impair contracts or violate rights of individuals or corporations.

Under this head a second objection was taken. It is contended that, as no appointment of government directors has been made since 1845, the corporation has ceased to exist.

The 16th section provides, first, for the election of seven directors by the stockholders on the first Monday of February; it also provides for the appointment of five directors on the part of the Territory to be made on the 4th Monday of January annually. It also contains a provision that if such election and appointment shall not be made on the days limited and appointed it may be made at any other time, and those in office shall continue until a new election or appointment, and the board is empowered to fill vacancies by death, resignation or removal from office. These provisions are, it seems, a full answer to the objection. If the State does not make the appointment of government directors, those last in office continue until a new appointment; if they die, resign, or are removed from office, the Board can fill the vacancy. No omissions, therefore, of duty on the part of the State government can work the destruction of the corporation.—The provisions of the charter are ample and cover all contingencies which can arise on this subject. The authorities cited by the counsels for the plaintiffs in error do not apply to such a case.

II. A second point made is as to the right of the bank to sue for the principal sum mentioned in the bond. Although this is a loan under the 29th section of the charter which a stockholder of the bank has a right to require, yet we contend the continuation of the loan is dependent upon the payment of interest at least once a year, and renewal of the obligation by the borrower. But it is argued, that when the sum so borrowed is sued for because of the failure to pay interest, and recovered and paid into the vaults of the bank, the stock-

holder of the bank has a right to put in his note or obligation and take it out again on loan, and therefore, it is an act of absurdity to sue for and recover the principal. This bank is one of peculiar features and differs from ordinary banks. It was to borrow its capital upon the Territorial bonds and to pay interest semi-annually upon the amount so borrowed, and two-thirds of its capital was to be lent to the shareholders. The utmost punctuality on the part of this class of its debtors was vitally important to the successful operation of the institution. Therefore we say that payment of interest at least once a year was interposed as a condition, the non-performance of which defeated it. I have no doubt but the bank would have been justified by a court of equity or of law in refusing to renew a loan where the party had failed to pay the interest and forced the bank to the vexation and expense of a law suit. It was a forfeiture which the party must excuse for some good reason, before he should be restored to his original rights. If the bank has to sue each and every stockholder for the annual interest, the delay and expense would materially cripple the bank in its ability to meet its engagements and preserve the credit of the Territory which had been pledged for its accommodation.

By the amendatory act of 1839 it was provided that the omission to renew the note and pay interest for thirty days should work a forfeiture, and the bank should proceed to sell the stock and receive from the purchaser a bond and mortgage on property of the value of the stock, and such new stockholder should be entitled to all the rights and privileges of an original stockholder.—(See Thompson's Digest, 296, sec. 43.) The effect of this was to cut off, as an useless member of the body corporate, one who should fail to perform his obligations, and obtain a new and useful one in his place. This provision would have been effectual, and probably was about the time of its passage, in enforcing the performance by this class of debtors of their obligations, but unfortunately it was applied too late. The bank had extended itself too far—had lent too much money—had got into difficulties and embarrassments and its notes were becoming depreciated, and the bank could not sell the stock. The prudent who were already in were anxious to get out, and the prudent who were out were determined to keep so. The visionary and speculative and those embarrassed, who were anxious to obtain money at any price might have purchased, but such were not the men who

were calculated to save the institution on the verge of ruin. This was an ancillary remedy, provided by the Legislature to ensure the performance of the obligations of the shareholders; but from the causes I have mentioned, and the depression of values of every species of property which commenced shortly afterwards, has rendered it inoperative. It is, however, useful, as showing the views and intentions of the Legislature, and is, I contend, explanatory of the 29th section and its proviso.

III. The plaintiffs in error place their defence on another ground, viz: that the obligation not being made in strict compliance with the powers given to the corporation by its charter, is, therefore, void, for want of authority on the part of the bank to contract, and the following particulars are assigned:

1. That for the interest on the note a bond was taken in advance, at the time of making the loan.

2. That the obligation was made for a less period than one year.

3. That a greater rate of interest was reserved and taken than was authorized by the charter.

As to the first point, I refer to the 28th section of the charter, which regulates the rate, time and manner of taking interest. It provides for "loans or discounts," and says "the interest may be paid or deducted in advance." Thomp. Dig., 293.

The 29th section does not, in express terms, or by any just implication, change this rule. Its office is merely to provide the loan which the shareholder shall have a right to require, and establishes no new rule as to the time when the interest shall be paid. The term credit is the only new term introduced into this section, and it is to be granted without security.

But if the 28th section does not apply to the time when the interest may be demanded and paid, then I contend it may be taken in advance, under the general authority "to discount on such *terms* and such securities as they shall judge proper," contained in the 15th section of the charter. Thomp. Dig., 289.

The right to discount, *ex vi termini*, gives the right to take the interest in advance—such is the only mode in which a discount can be made. Bk. U. S. *v.* Fleckner, 5 Pet. Cond. R., 462. Upon this question, I cite, also, the decision of the Court of Appeals of the Territory of Florida, in the case of the Union Bank *v.* Brown, decided at January term, 1844.

2. That the obligation was taken for a less period than one year. I apprehend there is no force in this objection—one year was doubtless the *maximum* of time for which these obligations should be made—they could not be taken for a longer period, but might for any time within that stipulated. See Union Bank *v.* Brown, before referred to.

3. That a greater rate of interest was reserved and taken than that authorized by the charter, and was, therefore, a valid contract, for want of power. This is supposed to have been effected by two modes: 1. Taking the interest in advance. 2. Computing it by Rowlett's tables.

There is a difference between the exercise of an admittedly existing power in a mode and manner different from the directions of the charter of incorporation, and the assumptions and exercise of powers not given or expressly denied. See 7 How. Miss. R., 508, Commercial Bank *v.* Nowlan.

When a bank takes a greater rate of interest on a discount than is allowed by its charter, the contract is not void, for want of authority, inasmuch as a discount or loan is within the scope of the powers of a bank; otherwise, where the power exercised is foreign to the purposes of the creation. Ibid. See also Angell & Ames on Corporations, 200, sec. 3. 8 Gill & Johns, 319. Union Bank *v.* Jacobs, 6 Humph. R. 515. Mum. *v.* Commission Co., 15 Johns. R., 52. Hayward *v.* Pilgrim. 21 Pick. R., 270. Mott *v.* Hicks, 1 Cowen, R., 513. Bank *v.* Hammond, 1 Rich. L. R., 281.

When it is necessary to pursue the particular mode prescribed in making the contract, see Angell & Ames on Corporations, 188.

It could make the loan then, undoubtedly, by the particular directions of the 29th section, or by the general grant of powers contained in the 15th section—*quacunque via data*, it was the admitted exercise of an existing power.

A review of the cases cited by the counsel for the plaintiff in error on this point, will show that they were:

1. When the corporation transcended the bounds of its powers either expressly given, or arising by necessary implication.

2. When it acted in violation of some general law restrictive and prohibitory in its charter; or,

3. When the particular mode of contracting was made to constitute the very essence of the contract.

IV. The bond not being void for want of power in the corporation to make the contract, is it void for having exceeded the authority conferred?

And first it is well enough to inquire if it has exceeded the authority given. 1. The right to take interest in advance has already been discussed. Though it was formerly held that taking interest in advance by any other than a banker and on negotiable paper, was illegal—yet this restriction has, by later decisions, been removed. All natural persons, and all corporations who by charter have authority to discount, may do so. 2 Blyd. on Usury, 58, and the authorities cited. Union Bank *v.* Brown, in Court Appeals, January, 1844.

Next, as to the calculation by Rowlett's tables. I refer to the testimony on this point in the Record, p. 37—The interest for the year is calculated at 365 days, and the months as aliquot parts of the year, and give the interest correctly. For the sake of convenience the odd days less than a month are calculated at 30 days for a month. It depends on the mode of using the tables whether they will make any important gain. See Lyon *v.* the Bank, 2 Stew. Ala. R. 469. Bank *v.* Hunter, 1 Dev. R. 129. Bank *v.* Durkee, 1 Vermont R. Crump *v.* Nicholas, 5 Leigh R. 251. Planters Bank *v.* Snodgrass, 4 How. Miss. R. 629.

This point was also expressly decided in the case of the Union Bank *v.* Brown, before referred to in the Court of Appeals of Florida.

The corrupt intention is an essential ingredient in usury—the intent to violate the law and gain more than is allowed.

In addition to the above authorities, I cite, Bank U. S. *v.* Waggener, *et al.*, 9 Peters R. 378, 400, 401.

The question of the corrupt intention of the bank was expressly left to the jury in the charge No. 5 given, (Record p. 47.) The finding of the jury negative any such asumption.

2. But supposing it has exceeded the rate of interest fixed by the 28th section of the charter, would the contract for that reason be void?

The charter of the bank contains a restriction merely as to the amount of interest; it contains no penalty, neither does it declare the contract on which more interest than eight per cent. is reserved or taken, to be void.

Banks and other corporations are subject, like natural persons, to the general laws in force at the time of their creation; and if the charter does not provide any penalty for usury, or for excess of pow-

ers, it is to be regulated by such general law. If in making a contract, a corporation should exceed its powers, and the excess can be separated from that part which is within the powers, the excess only is void, and the remainder valid. Such excess of power might be punished by the State as a malefeasance by forfeiture of the charter, yet it would not make the contract void. The following cases, it is believed, will cover the whole ground here assumed:

Fleckner *ads.* Bank U. S. *v.* Peters' Cond. R. 464. U. S. Bank *v.* Dandridge, 12 Wheat. 64. U. S. Bank *v.* Owens, et al., 9 Peters, 378, 403. Commercial Bank *v.* Nowlan, 7 How. Miss. R. 530. Planters' Bank *v.* Sharp, 4 Smedes and M. 75. Stribling *v.* Bank of Valley, 5 Rand. 140, 151. Louisville R. R. Co., *v.* Litson, 2 How. S. C. R. 127. Thornton *v.* Bank Washington, 3 Peters 42. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 260. Bank *v.* Hammond, 1 Rich. L. R. 281. See also Vidal *v.* Girard's Ex'rs., 2 How. S. C. R.

It seems to me, however, that "it does not lie in the mouth" of a stockholder to set up as a defence in a case like this, the excess, or even unlawful assumption of power by the bank, when the result would be a loss of two millions of dollars of the capital of the bank to its creditors, and a gain of that amount by the stockholders, who would be participators in the unlawful act. Little *v.* O'Brien, 9 Mass. 423. Chester Glass Co. *v.* Dewey, 16, Mass. 94.

V. We contend, however, that if the obligation is not good and valid as a loan under the 29th section of the charter, it is good and valid at common law.

The Supreme Court have in several cases laid down with much accuracy, the law on this point. If this agreement is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. See United States *v.* Tingley, 5 Peters, 115. United States *v.* Linn, 15 Peters, 311.

Are the parties to this contract competent to make it? The deceased, S. Parkhill, in his life time, was certainly able to contract,—and it remains to establish that the bank was equally so.

"In constituting a body corporate, a legal or artificial person is substituted for a natural person, and when a number of natural persons are concerned, there is given to them the property of individuality. The common law of every State or country annexed to this local or

artificial person, when created, certain incidents and attributes, and both by the laws of England and the United States there are several powers and capacities, which tacitly and without any express provision, are considered inseparable from every corporation." Angell & Ames on Corp., 95.

Its essence consists in part in the power to take and grant property, contract obligations, and to sue and be sued by its corporate name. Its incidental powers are such as are best calculated to effect the object of its creation. Ibid. 2 Kent's Comm., 224. 4 Wheat. R., 518.

As to mode of contracting &c., evidence of common consent of corporation sufficient. Angell & Ames, 167-'8, 174. 10 Mass. R., 401. 5 East R., 239, 292. 6 Viner's Ab., 137, pl. 29.

Whenever a corporation is acting within the scope of the legitimate purposes of its creation, all parol contracts made by its agents are express promises of the corporation. All duties imposed by law, and benefits conferred at their request, raise implied promises, which may be enforced. Bk. of Columbia *v.* Paterson, 7 Cranch R., 299. To lend money and take security for its repayment, was certainly a legitimate act of the Union Bank. See 15th section of Charter.

If a particular mode of contracting is specified, it is only imperative, when the direction *constitutes the terms* on which the power is granted. Angell & Ames on Corp., 6. 188. In the charter of the Union Bank, there is no particular form prescribed.

I refer to the decision of the court in the United States *v.* Linn, 15 Peters, 315, and the remarks of the court, as to the grounds which would authorize a court to declare an instrument void.

It follows from the positions and authorities, and the evidence in the record, that there were parties able to contract—that they did contract—that there was a sufficient consideration, and that it was for a lawful purpose. It is, therefore, a good contract at common law.

VI. As to the last ground assigned for error, that the judgment was improperly entered up for the plaintiff, the issue of *plene administravit* being found for defendants, the judgment should have been for the defendants generally, notwithstanding the other issues were found for the plaintiff below.

The law, as cited from 2 Lomax on Executors, 446, sec. 11, seems to be supported by 2 Saund. R., 217, (note 1,) which says

that if the plaintiff takes issue on the general or special plea of *plene administravit,* and it be found against him, he cannot have judgment of assets *quando acciderint,* and cites 1 Roll. Abr., 929, (B.) pl. 2. Bro. Abr., Executor, 18 S. C.

It is not easy to discover the reason for the difference between the result of a verdict, and the confession of the plea by the plaintiff. In the last case, all the authorities hold that the plaintiff may enter up judgment for assets *quando.* Ibid.

But this seems never to have been the doctrine in the United States. In New York, upon the verdict of no assets, the plaintiff is entitled to his judgment *quando, &c.* 19 Johns. R., 266. 4 Cowen's R., 447. 6. 6 Cowen R., 71.

So in Kentucky, if the plea be found against the plaintiff, he may yet have judgment assets *quando.* Burns *v.* Benton, 1 A. K. Mar., 349. It is error, if upon such a verdict, judgment be entered generally for defendant. Miller *v.* Towles, 4 J. J. Mar., 255.

As to the practice in Pennsylvania, see Wilson *v.* Hurst, Peters' C. C. Rep., 441, n.

LANCASTER, Justice, delivered the opinion of the court:

This case comes by cross writs of error from Leon Circuit Court. We shall, for the sake of convenience, embody our opinion and rulings in one decision.

The first question, to which we will turn our attention, is one raised in argument by the counsel of the administrators, earnestly argued and much insisted on. By 15th section of the act of incorporation, the bank is created, and declared a body corporate and politic for and during the term of 40 years from the passage of the act, viz: from 13th February, 1833.

By an act of Congress of 3d March, 1845, Florida was declared to be a State of the United States, and admitted into the Union on an equal footing with the original States in all respects whatsoever.

The question raised is, whether the corporation did not perish on the 3d of March, 1845, notwithstanding its grant of 40 years existence; and it is contended the charter must be subject to the implied limitation "provided the Territory shall so long continue."

This question is assumed in argument to arise under plaintiff's demurrer to the seventh and last plea of defendants. That plea in sub-

stance alleges, that the writing obligatory declared on is not the act and deed of defendant's intestate in his life time, but is and was wholly illegal, null and void, because made in consideration of a loan of money upon a pledge of stock, (he being a stockholder), and that the bank, the plaintiff, wilfully and knowingly reserved and took more than the lawful rate of interest allowed to said bank to take upon such loans by law and its charter. Upon argument in the Circuit Court, the demurrer was sustained, and no exception was taken to the ruling of the court.

The tenor of the plea does not appear to this court to put in issue the existence of the bank, but virtually admits its existence. This suit was commenced on the 31st of March 1846, and as the position taken is, that the admission of Florida as a State, into the Union, on the 3d of March 1845, by implied limitation, extinguished the charter on that day, no good reason is apparent, why a plea presenting that issue, if deemed necessary to the defence, was not prepared and filed during the preparation for trial of the case. This cause appears to have been elaborately investigated in the court below, and lengthy bills of exceptions have been filed to the decisions of that court by each of the parties, and this point is not raised by either bill of exceptions. It does not come by the pleadings before this court, and any opinion delivered on it, might justly be termed extra-judicial, or *coram non judice.*

To allow points not raised by the record to be adjudicated by this court, might, and probably would, result most inconveniently. Who could set limits to their number?

The case of Mumma vs. the Potomac Company referred to 8 Peters R. 281, does not appear to sustain the authority of this court to take jurisdiction of this point. That was a case in which the plaintiff, Mumma, sued out a *sciri facias* to revive a judgment against the Potomac Company. Upon that *sciri facias* the attorneys, by way of plea, shew and suggest to the court a state of facts, and among other recitals, that the Potomac Company had surrendered its charter to the Chesapeake and Ohio Canal Company, and an agreement to that effect was signed by the counsel for both parties, and made a part of the record. The question upon this agreement was, whether any judgment can be rendered against the Potomac Company upon the *sciri facias* to revive a judgment mentioned in the writ. Upon this question the Circuit Court of the District of Columbia gave judg-

ment for the defendants, which was taken by writ of error to the Supreme Court of the United States, and the judgment of the Circuit Court was affirmed. The jurisdiction of the court was derived from the writ of *sciri facias* to revive, &c., and not from the agreement of counsel as to the facts: and the decision of the Supreme Court was upon the judgment properly brought before it, from the Circuit Court, and upon the point on which that judgment was rendered. In the case before this court, although the counsel for the bank did not decline the argument of the point now under consideration, yet there is no agreement of counsel on the record submitting it for adjudication; and if there was, the case before referred to, would not be an authority to justify this court, in proceeding to its adjudication. Without therefore, any disposition to avoid it, if properly before us, we must in this case decline its decision.

The question on the record in this case, arising from the decisions of the Circuit court, admitting on the trial testimony excepted to, refusing instructions asked, and giving instructions excepted to, as well as a refusal to admit testimony offered, and exceptions thereto taken, seems to this court to render a review of many provisions of the act of incorporation, as well as amendments thereto, necessary, in order to give a construction to the charter, applicable to the many questions presented on the trial below. We proceed to that review, first remarking that but little light is afforded us by the decisions either in England or the United States, upon the subjects involved. But few charters of incorporation, bearing much analogy to that of the Union Bank of Florida, have been passed by the States of the Union, and it is not known that any similar ones have been passed elsewhere. Neither is it known or believed, that any of those incorporated in any of the States, have undergone judicial investigation or construction, so as in any degree to aid this court in arriving at sound and just conclusions. There are, however, rules laid down in the books, by which to be guided in the construction of statutes, and to these we shall have recourse as occasion may seem to require.

The 1st section of the act of incorporation provides for the establishment of the "Union Bank of Florida with a capital of one million dollars, and with the privilege of increasing it to three millions of dollars, which capital shall be raised by means of a loan, on the faith of the Territory, by the Directors of the Bank." Of which only one million to be taken at the time of organizing the bank.

By the 2d section, books of subscription, towards constituting the capital fund of said bank, were authorized to be opened at Tallahassee and other places therein named, for subscription to the stock.

By the 7th section, "The Board of Directors of the bank shall be the judges of the sufficiency of the mortgages offered for the stock, and shall have power to reject the same."

The 8th section enacts, "To secure the principal and interest of the bonds to be issued by the Territory, for the purpose of raising the capital of the bank, the subscribers shall be bound to give a bond and mortgage to the satisfaction of the Board of Directors, on property, &c."

The 9th section provides, "The bonds and mortgages given to secure the subscriptions to the capital stock of said bank, shall be deposited in the office of said institution, the said mortgages having been first recorded according to law; and whenever application shall be made by a stockholder to transfer his stock and be discharged, such transfer and discharge may take place, upon the new stockholder complying with the same requisitions stipulated in the foregoing (the 8th) section, in the case of an original subscriber, and in all such cases of transfer and discharge, the votes shall be taken by yeas and nays. But any stockholder may, at any time, release his property by paying the amount subscribed, and also such loans as may have been made on the faith of it.

The 10th section provides for issuing one thousand bonds of one thousand dollars each, made payable to the Union Bank of Florida, to be "signed by the Governor, and countersigned by the Treasurer, and under the seal of the Territory," for which bonds a form is given in said section; which bonds are made transferrable by the endorsement of the president and of the cashier of said bank by said section—for the payment of which, the faith of the Territory is pledged, "in order to facilitate the negotiations by said bank for the loan of one million of dollars."

The 11th section provides, that "both the capital and interest of the said bonds shall be paid by said bank, as the same shall become due."

The 14th section prescribes the form of mortgage to be given to the Union Bank by the stockholders, and begin by saying, "The mortgage to be given by the subscribers to the stock of the Union Bank, shall be in the following form:"

We will inquire, what constitutes a stockholder in the Union

Bank, and what are the rights of the bank in the stock subscribed to it?

It may safely be assumed the act of subscribing for shares, as provided in sec. 2 of the charter, does not *per se* make a stockholder, any more than the mere subscribing for cash stock will make a stockholder in an ordinary banking incorporation. In the latter case, the shares subscribed must be paid for in money; in the former, according to the sections before recited, they were paid for by the bond and mortgage of the stockholder. The giving of a mortgage for the stock satisfactory to the Board of Directors, was the final act necessary to constitute a subscriber for shares a stockholder. See sec. 7; and that mortgages made and delivered to the Union Bank was the only consideration or payment of any nature given by the stockholder to the bank, for his shares of certificate of stock in it.

The bank, then, being, under the charter, the lawful possessor and owner of the mortgages, makes them available by the 8th and 10th sections for the procurement of territorial bonds. These bonds were by the 10th section of the charter, made payable to the bank, and transferrable by the endorsement of the president and cashier of the bank; and by the 11th section, after sold, both capital and interest payable or redeemable by the bank, as it becomes due. It appears, therefore, too plain to be questionable, the bonds, when procured, were the property of the bank, and when sold, the funds arising from the sale were the funds of the bank.

It is contended, in view of the 8th section, the object for which a bond and mortgage was given by the subscriber for stock, was to secure payment of the principal and interest of the bonds issued by the Territory, to the extent of his stock subscription. It is admitted they were given for that purpose, yet it seems to this court that was not the only purpose of the mortgage. The last clause of section 9th provides, "but any stockholder may, at any time, release his property (*mortgaged*) by paying the amount subscribed, (as stock,) and also (by paying) such loans as may have been made on the faith of it, (*the mortgaged property.*)

It (the last word of the sentence) must, on sound rules of grammatical construction, refer to its last antecedent noun, which is *property;* so that, supposing the stock to have been paid for in money, the stockholder, to have this property released from the mortgage lien on the bank, must also pay such loans as may have been made on the faith of the property specified in the mortgage.

Shares in this bank were not, as in banks usually, purchased by cash payments; and while a stockholder in a cash stock bank would, on a pledge of shares, pledge the very money he had paid for them, in this bank, unless he pledged the mortgage securities given for stock, he would pledge nothing valuable; so that, if contended loans were to be made on the faith of the subscription for stock, without reference to the mortgage security, then the gross absurdity will follow, that the bank was bound to loan to its stockholders, without any security whatever.

Suppose for a moment, the instant of time when, according to its charter, the Union Bank was first in a condition to discount—it was the holder and owner of mortgages on real estate and negroes, executed and delivered to it by its stockholders, to the value of one million of dollars. It was also the holder and owner of one million of dollars in money, produced by the sale of the bonds, and for the payment and redemption of the principal and interest of these bonds, as they might fall due, it was bound: and if the time we are considering occurred before any interest had accrued on the bonds after sale, yet the bank owed just as much money as it possessed, and the stockholders had no valuable interest in bank save their mortgages. The stock, for which nothing had been paid, if we exclude the idea of the mortgages, had not really appreciated, and was really worth nothing, save only such ideal appreciation as the right to a loan under the 29th section of the charter might induce those needing money to be willing to pay for that right of loan. If, at that time, a stockholder had a right to credit in bank, without other security than a pledge of his shares in the capital stock in the bank, and also a loan on a pledge of those shares for two-thirds their amount, still, excluding the idea that the mortgage had been given as payment for the shares, we must arrive at the conclusion that he, the stockholder, had a right to demand and have from the bank a stock loan, without any valuable security whatever: and thus, that the bank was compelled by its charter to loan to its stockholders two-thirds of its entire money capital, with a positive certainty that neither principal nor interest on that loan would ever be paid before the expiration of its charter, and almost with an equal certainty, not at that time or any other. Such we feel authorized from the wording of the charter, to declare was not the intention of the Legislature, and cannot be a sound construction of its provisions. We have shown, we think, that the mort-

gage given by the stockholder to the bank, was executed for the double purpose—1. As provided by the 8th section, to secure payment by the bank of the principal and interest of the bonds issued by the Territory; and for this purpose, the Territory, the third party, in the charter of the bank is interested in the mortgages; 2. To secure payment from the stockholder to the bank of his stock note, or obligation, and interest, provided he fails to renew the note or obligation, and pay interest, as provided in the 29th section—and for this purpose, the bank and all its creditors are interested in the mortgages, as well as for the first purpose.

It has been alleged in argument, and indeed the court below virtually so instructed the jury, that the money raised by the sale of the bonds was, in the hands of the bank, the money of the stockholders—that the bonds sold by the bank were, *in form only*, the bonds of the Territorial government, and in *effect* and *actually were* the bonds of stockholders, and are in effect and contemplation of law, as if both bond and mortgage had been originally made and executed to the capitalist or holder of the territorial bonds by the stockholder—that, upon the sale of the bonds, the stockholder became debtor to the vendee of the bonds, and he, in turn, the creditor of the stockholder—that the bank was a mere agent or trustee of the stockholder, to see the principal and interest paid, agreeably to the terms of the bond and mortgage, without other rights in the premises, save the privilege of endorsing for its principal, the stockholder.

The 1st section of the charter incorporates a bank by the name of the "Union Bank of Florida," and says it shall have a capital of one million dollars, with the privilege of increasing to three millions.

The 15th section provides that "The subscribers to the stock of said Union Bank, their successors and assigns, shall be and they are by this present act created a *corporation* and *body politic*, for and during the term of forty years from the passage of this act, and shall be and are hereby made capable, under the name of the 'Union Bank of Florida,' to receive and possess all kinds of property, either movable or immovable, and to sell, grant, alienate, demise and to dispose of the same—to loan, negotiate, take mortgages and pledges, and to discount on such terms and such securities as they shall judge proper;" and after some provisos not necessary here to be considered, the section adds: "They may sue and be sued, plead and be

pleaded, answer and receive answers in all courts having competent jurisdiction, and to have a common seal, and the same to alter and renew at pleasure, and to ordain and establish such by-laws, rules and ordinances as they shall deem necessary and suitable for the government of the said corporation, not being contrary to this act, nor to the constitution and laws of the United States, or to the laws of the Territory of Florida."

The Union Bank of Florida, by these provisions of its charter, may justly be styled *a corporation,* and is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations beyond which it cannot regularly proceed. See Bac. Abr. title corporation, letter D., and many authorities there cited. Its name is the very knot of the combination of its members, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. Bac. Abr. Corporations, Letter C. Although a corporation aggregate is said to be invisible, and to exist only in supposition and intendment of law, yet such an artificial body is, by its creation, capable of purchasing or parting with its possessions. Bac. Abr. on Corporations, Letter E. The name of a corporation is as the name of baptism. 10 Co. 28. 2d Inst. 666.

We repeat, therefore, what we have before shewn, the mortgages belonged to the bank, for it had a right to take mortgages. The Territorial bonds, issued and made payable to the bank, were also the property of the bank, for they were issued on the faith and value of the mortgages held by and belonging to the bank; and the proceeds of the sales of those bonds belonged to the bank, for it, and it alone, by its officers, had the right to sell and transfer them.

It is said, on the sale of the Territorial bonds, the stockholder became debtor to the vendee of the bonds, and he in turn became creditor to the stockholder. Without remarking on the novelty and surprise with which this doctrine would strike the bondholder—let us see if it be so. Is every bond so marked that each bondholder can know what stockholder he must look to for its payment? Or must he look to all the stockholders, and has he any means of knowing them, or any of them, but through the courtesy of the bank? If a stockholder is the debtor of a bondholder, is it of all bondholders, or a particular one? And if a particular one, is it for all the bonds he may hold, or only for so many bonds, and parts of bonds as his stock

may amount to? Should he transfer his stock, as by the charter he may, does he make his transferee the real debtor, and release himself without the knowledge or consent of *his* creditor, the bondholder? Answers to these inquiries will, in the opinion of this court, fully shew the fallacy of the position assigned the stockholder, and which they are intended to controvert.

The first clause of the 3d section of the act of incorporation is also invoked to shew the charter will not admit of the construction in this opinion indicated. That clause is in these words: "In all instances in which slaves shall be mortgaged, in virtue of this act, the possession thereof shall be and remain in the mortgagor, any law to the contrary notwithstanding, until by the covenant or covenants contained in said mortgage, it shall be lawful for the said bank to seize the same." Let us premise, if it was intended at all events to permit the stockholder to remain in possession of the slaves mortgaged, any law to the contrary notwithstanding, until the expiration of the charter of the bank, why did the Legislature not say so, instead of using the more doubtful and circumlocutory language adopted? If we adopt the construction that the language used (and such it is contended is its meaning) was intended to protect the mortgagor in possession of the slaves until the Territorial bonds shall become due, and the bank shall make default in their payment, we must destroy the plain intent of the 9th and 22d sections of the charter. If we understand the covenant or covenants contained in the mortgage to apply as well to the payment of the stock note, or obligation of the stockholder, as to securing payment of the Territorial bonds when due, and that on default of complying with the proviso in the 29th section, to give a note or obligation annually for repayment of the money, (loaned) and paying up the interest, the bank may seize the mortgaged negroes, then we save the 9th, 22d, 26th, and other sections of this charter, and make all stand together, and all bear in the rights and duties both of the bank and its stockholders, and all tend to advance the interest of the creditors of the bank; while the contrary construction would tend to make of the stockholders an irresponsible class with exclusive privileges, (and the greater the stockholder, the greater the privilege,) as well also as inflict on the bondholders and other creditors of the bank, the greatest injury and the most stupendous fraud. Can there be a doubt we should adopt a construction which makes the mortgage property responsible for the stock note due the bank.

In the case of the Commonwealth vs. Kimball, 24 Pick. 370, Ch. Justice Shaw says: "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute; and where any particular construction would lead to absurd consequences, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion." In the case of Wales *v.* Stetson, 2 Mass. 146, Ch. Justice Parsons says: "In the consideration of the provisions of any statute they ought to receive such a reasonable construction, if the words and subject matter will admit it, as that the existing rights of the public, or of individuals, be not infringed."

In Bac. Abr. title statute, letter H. it is laid down, "The most natural and genuine way of construing a statute, is to construe one part by another part of the same statute, and this best expresseth the meaning of the makers, and such construction is *ex viceribus actus.*" And again, same title. "If the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if from the whole purview of the law, and giving effect to the words used, it may be fairly done."

Impressed with the soundness and wisdom of the afore recited rules, and aiming to adjudicate by their spirit and true meaning, construing one part by another part of the whole charter of the bank, and in view of the verbal obscurity in some of the provisions, which render it difficult to arrive at the true meaning of the Legislature, but bound to presume it was never the intention of the Legislature, that absurd, or unjust, or even inconvenient consequences should flow from the enactments contained in the charter, we think in every instance where a stockholder fails to renew his note, and pay up the interest, if the bank shall file for cancellation, with any officer of the Government, whose duty it may be to receive them for that purpose, and in default of such an one, with the Clerk of the court in which suit may be depending, to be delivered to such officer for the same purpose, as many Territorial bonds as were issued on the faith and value of the mortgage securities of such defaulting stockholder—that then the bank, upon judgment rendered and execution issued, may of right and according to the law of its charter, levy upon and sell all the mortgaged premises of such defaulting stockholder to be applied to the

extinguishment of the judgment rendered on his stock note debt, together with interest due and costs accrued, the residue, if any, to be first applied to liquidate his liabilities in bank, as endorser or security, and the remainder, if any, to be paid to him.

Two exceptions taken by the plaintiff below to the decisions of the Circuit Court, admitting testimony upon the plea of *plene administravit*, remain to be considered. 1st. Certain receipts of H. Manly, the present husband of the relict of S. Parkhill, deceased, the intestate of defendants, which receipts purport to have been given for sums in part of the dower of Mrs. Manly, rejected by the Court of Probate. 2. The admission of testimony upon an alleged liability of the administrators for counsel fees, and for which they claim the right of retainer of such sum as the witnesses supposes would be a reasonable aggregate compensation for services of counsel in this case, and some twenty cases of detenue brought by Parkhill's administrators, and also a suit for foreclosure brought by the bank against Mrs. Manly and her husband, which was carried to the Supreme Court.

The act of the Legislature of February 15, 1831, concerning the duties of Executors, Administrators and Guardians, (see Tho. Dig. p. 237), provides for the settlement annually of the accounts of Executors and Administrators by the Judge of Probates, and that they shall render full and correct accounts of the receipts and disbursements of the estates in their charge, and says, "if approved, or so much thereof as may be approved, it shall be entered on the record:" and the accounts filed. If it be not approved, the only proper course by which the Executor or administrator can attain redress, if injured, is by appeal or writ of error. But if rejected, as the order of the Court of Probates is conclusive until reversed, it is not seen how the administrators can be permitted to avail themselves of it as evidence on the plea of *plene administravit*. And this objection lies as well to the evidence to establish the value of the counsel fees, which, as well as the first, should have been audited and allowed, or if rejected, by appeal reversed, before a right to use them as evidence on the plea of *plene administravit* could attach. On the subject of counsel fees we will remark, it is laid down in the case of Sterrett's appeal, 2 Penn. Reps. 426, "Where an estate is so situated that legal advice is proper to direct the course of the Executors, or where they must bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed, and where they are em-

ployed to obtain what is honestly supposed to be the rights of the estate, the estate ought to pay the counsel fees. But where Executors neglect to settle and pay, and are sued by creditors or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fees should come from the estate." And this doctrine, in our opinion, is correct.

On the trial of this cause, the Circuit Court gave ten instructions, numbered from one to six inclusive, and from eleven to fourteen inclusive—to all which, defendants by their counsel excepted, save the second, and also moved the court to give fifteen several instructions, which the court refused, except the third, which was granted, and the fourth, which was refused, and substituted by another—all which is contained in their bill of exceptions, and by reference to the record will fully and at large appear. To all which refusals, the defendants by counsel excepted, and prayed their bill of exceptions may be signed, sealed and made part of the record, which was done; and thereupon they obtained and sued out their cross writ of error to this court.

By reference to the instructions given and refused, and excepted to by the defendants below, it will be perceived the principal points they make are aimed at the rate of interest which the bank might lawfully demand and take from a stockholder who was its borrower, and the time at which that interest was payable to the bank.

To have a clear understanding of these questions, it is necessary to examine the 28th and 29th sections of the charter, which are as follows: "Sec. 28. Upon loans or discounts, the said bank shall not receive more than at the rate of eighteen per centum per annum—the interest may be paid or deducted in advance." "Sec. 29. Each and every stockholder shall be entitled to a credit or loan equal to two-thirds of the total amount of his shares: *Provided,* That notes or obligations for repayment of the money shall be annually received, and the interest paid up: *And provided. also.* that when the accumulated surplus profits shall have equalled the amount of the bonds issued by the Territory for obtaining the capital of the bank, the interest upon all loans shall be reduced to a rate not exceeding six per centum per annum."

We think it manifest, from the last proviso of the 29th section, the rate of interest which the bank was authorized by law to charge was more than six per centum per annum; otherwise, why did the

legislature provide, upon the contingency therein named, that the rate of interest should be reduced, so as not to exceed that sum.

The true construction of the word *credit* in the 29th section, has been the source of much discussion, and it has been contended it is of such extensive import or signification as to entitle a stockholder, at all times and under all circumstances, to a loan from the bank, equal to two-thirds of the amount of his shares. The term is used in the connection, *"credit* or *loan,"* and was probably intended by the legislature for nothing more than equivalent for the word *"loan,"* or it may have been intended to invest the stockholder, on the faith and virtue of the mortgage securities he had given the bank, with a right to a loan, free of the endorsers which an ordinary borrower might be required to give. But whichsoever may be the true intent and meaning with which it was used, it was subject to the proviso, that notes or obligations for repayment of the money (borrowed) shall be annually received and the interest paid up. It was contended that this proviso did not create a condition precedent or subsequent to defeat the loan; and if a condition, could only be a condition subsequent to defeat the continuance of the loan

Will or can any one successfully contend that a stockholder, as such, was or could be entitled to any loans whatever, unless he first gave a note or obligation for repayment of the money borrowed, and if that was necessary, (as we think it was,) whether it was not a condition precedent to obtaining a loan? At the time of giving a note or obligation for repayment of the money, by the conjunction *and* he was also required to pay up the interest. So it seems the giving the note and paying the interest at the time of borrowing the money, are both conditions precedent, properly deducible from the 29th section of the charter.

It is objected the frame of words, *"and the interest paid up,"* are repugnant to this construction, and they must mean interest *in arrear,* but with equal propriety they may mean interest *in advance;* and this construction of the 29th section harmonizes with the only rational one of which the 28th is susceptible. It provides that the interest may be paid up or deducted *in advance* upon *loans* or discounts by the bank. The term, "may be paid or deducted in advance," are terms directory and enabling to the bank, as are all the provisions of that section; and if we understand that the bank, upon a loan or discount, may deduct the interest in advance, or upon a re-

newal, may require it to be paid in advance, we but understand these words according to their natural force and usual import. The proviso, therefore, in our opinion, contains two conditions precedent to a stockholder's obtaining or continuing a loan under the 29th section, for a failure to perform either, (to wit: renew the note, or pay the interest,) would determine the duration of the loan, divest the right to have it, and invest the bank with a right of action against such defaulting stockholder. The authority of the bank, under the 28th section, to deduct interest in advance, is an authority co-extensive with the loans or discounts it may make; and this *is a loan*, peculiar in nothing save the right of the stockholder to have it, so long as he complies with the precedent conditions prescribed for his observance.

The bank has, according to the 28th section, as much right to deduct interest in advance on such a loan as on any other. That section further provides, the bank shall not receive more than at the rate of eight per cent. per annum, but it may be deducted or paid in advance. The rate, therefore, of interest, which, by its charter, the bank may deduct upon a loan or discount, is eight dollars from one hundred for the use of the residue for one year, and at the same rate for any shorter time—the *obligation* of a borrowing stockholder being to renew his note and pay the interest once a year; but according to bank usage, his *privilege* to renew and pay interest, oftener, as might suit his convenience. And if there be error in this, as it benefits the stockholder, he cannot complain.

The construction of the 28th and 29th sections, above given, appears to the court to be strengthened by other provisions of the charter. The last proviso in the 29th section contemplates, during the existence of the charter, surplus profits equal in amount to the Territorial bonds issued.

The 23d section contemplates surplus profits, provides for their management, appropriates subsequent profits, assigns a share to the Territory, as well also as the mode, on the expiration of the charter, of a division of capital.

The 36th section directs the disposition which shall be made of the profits which shall accrue to the Territory, and in other sections of the charter, mention is made of the surplus profits.

Now, when it is recollected that two, out of its three millions of capital, must, if required, be loaned to its stockholders—that near

that amount was in fact loaned them—that the bank itself has a continually accruing interest debt, payable to its creditors, which amounts annually to $180,000, besides contingent expenses as they may occur—unless a rigid exaction of interest is demanded of the stockholders, it would seem to require unusual arithmetical powers to enable a financier to discover how those surplus profits could arise.

The bank is known to be in an embarrassed condition, from which it will hardly recover, and has no surplus profits to manage. The value of its stock has depreciated, and is far below par. Yet it is perhaps not too much to say, had the debtors (stockholders and others) *bona fide* and fully paid interest on their respective liabilities, as the same were due the bank, unless, indeed, it was otherwise very badly managed, or had met with great and unavoidable misfortunes, it would now have in possession large surplus profits—its stock would be much above par, and its creditors would hold its liabilities at their original cash value.

We think, then, the bank had and has a right to interest on stock loans, at the rate of eight per centum per annum, and also to deduct it or require its payment in advance. The giving a note and payment of interest are conditions precedent, and without the performance of both, the stockholder has no right to a loan; or at any renewal or failure to perform both, determines the stockholder's right to his loan, and unless he pays the whole amount borrowed, the bank has a right of action against him.

Some objections have been raised in this case upon the use of Rowlett's interest tables. We will remark, that, from the testimony, it seems abundantly clear, the officers of the bank, when computing for a year by those tables, computed for a solar year, or three hundred and sixty five days, and for a month or months as aliquot parts of a year; in all which there cannot be error. But when computing for less than a month, as for days of grace, they computed each day as the 1-30th of a month, instead of the 1.365th part of a year. In computing fractions of a month, it is not easy, as every practical arithmetician must know, to adopt any rule but the one adopted in the tables, to wit: of supposing the month to consist of thirty days, which is nearer the 12th part of the year than any other integral number. We think the rule for practical purposes, the most accurate which has yet been devised, and are not inclined to condemn it.

The subject of the sale of the stock of Samuel Parkhill, under the amended charter passed in the year 1839, was also raised by the instructions asked by the defendants in the court below. By the 2d section of that amendatory act, the sale could only be perfected by the purchaser executing to the bank, within ten days thereafter, bonds and mortgages necessary to make him a stockholder to the amount of the stock purchased. If that was not done (as from the testimony in this case, it seems, was not), the sale would not be valid, and would not divest the liability or interest of the original stockholder.

The amendments contained in this law were only cumulative remedies by way of penalty to coerce stockholders to a more exact observance of renewing their notes, and paying up the interest, and we think a failure to effect and carry out its provisions, does not divest the bank of any other remedies given by the provisions of its charter and the law of the land against a defaulting stockholder.

Upon the subject of the rate of bank interest, the time when it is payable, the use of Rowlett's tables, and the time for which a stockholder's note is required by the charter to be given, we are fully sustained in the positions we assume, by a very able decision delivered by Judge Bronson, at the January term, 1844, of the late court of Appeals of the Territory of Florida, and we take pleasure in saying, that decision discusses the whole of the subjects with a perspicuity and clearness, alike honorable to the heads as the hearts of the very able court from which it emanated.

Having, as we think, fully reviewed all the points raised by the bill of exceptions in this case, which are deemed necessary to its proper determination, and having, we trust, given a reasonable, a just and correct construction to such provisions of the charter as seemed proper or necessary to examine, it now remains to pronounce the rulings of this court, based upon the record presented, and the exposition of the charter, and the legal rights of the parties, as hereinbefore set forth, explained and declared.

We are of opinion that the Circuit Court erred in permitting the receipts offered as evidence by the defendant, Moseley, as part of the dower of Mrs. Manly, to go in evidence before the jury, on the plea of *plene administravit* and also the evidence concerning the counsel fees—which decisions are hereby overruled and reversed. We are of opinion the Circuit Court erred in refusing to instruct the jury, as prayed by the plaintiff below in its bill of exceptions, and also in

each of the six instructions given by the court, and to which the plaintiff by its counsel excepted; which said decisions of the court, refusing to instruct as prayed, and instructions given and excepted to, are hereby overruled and reversed.

We are further of opinion, that on the nine instructions given by the court, and excepted to by defendants by their counsel, there is nothing to which defendants can take any legal exception, as the said instructions were fully as favorable to them as by law they had a right to require. And as to the instructions asked by defendants and refused by the court, and to which they by counsel excepted, upon a careful examination, we do not think they were by law entitled to the allowance of any of them, and therein have perceived no error.

It is, therefore, ordered, adjudged and decreed, upon the writ of error sued out by the "Union Bank of Florida" in this case, that the judgment of the court below be reversed, annulled and set aside—that a *venire facias de novo* be awarded, and a trial thereon had, according to the principles contained in this opinion—that the cross writ of error sued out by the defendants below in this cause be dismissed, and that they take nothing thereby, and that the plaintiff in error, the Union Bank of Florida, recover its costs, &c.

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SECOND VOLUME OF FLORIDA REPORTS.

ACTION—1. An action of debt cannot be sustained in this State against the heir upon the bond of the ancestor, although the heir be expressly named. Gilchrist, Judge, &c., v. Filyaw and wife, 94.

2. When money is the subject of bailment, or delivery to an agent, paid or unpaid, *assumpsit*, is the proper remedy:—*assumpsit* in the form of money had and received, usually being, in case of money, a substitute alike for trover, trespass, and case; though as a substitute for trover, there need be no previous demand. Gordon and wife vs. Camp, 422.

3. *Assumpsit* will frequently lie, where there has been non-feasance, misfeasance, or malfeasance, the plaintiff in such cases waving the tort. Ib.

ADMINISTRATORS—See Estoppel 3.

AMENDMENT—1. Where in an action of debt against two joint defendants the writ is returned "*non est inventus*" as to one, and a verdict is obtained against the other, but judgment is arrested on motion, on account of the insufficiency of the return as to the other; and where the order granting the motion in arrest, after reciting that the parties appeared by counsel, and that the motion was argued, simply concludes, "it seems to the court that the said motion be sustained," the court may, at a subsequent term, permit the return of the Sheriff to be amended, and the pleadings to be amended, and a trial upon the merits to be had, notwithstanding such order arresting the judgment. Butler, admr., vs. Thompson & Hagner, Trustees. 9.

2. The order sustaining the motion in arrest was not fined, but the cause remained *in fieri*, and the plaintiff might very properly have had leave to amend. Ib.

3. Where in such case the plea to the original declaration reached the whole merits of the cause, as well after as before the amendments to the declaration, it is a plea to the amended declaration, and makes an issue between the parties to be submitted to the jury. Ib.

4. The right of the court to order the record to be amended after verdict and judgment, so as to show the words "a true bill," which words were not entered by the clerk, when the Grand Jury presented the bill

of indictment, is not clear, and may well be doubted. Holton v. the State. 476.

APPEAL—1. An appeal from a final decree opens for consideration all prior or interlocutory orders or decrees connected with the merits of the final decree. Le Baron & Colpuit v. Fauntleroy et al. 276.

2. An *appeal* is the only proper method whereby to bring up a decree in chancery to this court, for review and revision. *A writ of error will* not lie in such case. Harris & Moore v. Cole. 400.

APPEARANCE—Whether an entry by the clerk, reciting *"this day came the parties by their attorneys,"* is of itself evidence of the appearance of both parties—quaere? Butler, admr., v. Thompson & Hagner, Trustees. 9.

ARBITRATION AND AWARD—1. Everything is to be presumed and every reasonable intendment made in favor of an award. Blood v. Shine. 127.

2. Where arbitrators agree on some of the facts, but differ with respect to others not connected with the first, there seems to be no good reason why the umpire, if he thinks proper, may not take those points on which the arbitrators agree to be as they report them, provided a re-examination is not required by the submission, or by either of the parties before he makes his award. Ib.

3. An award of payment of a specific sum is sufficient without directing a release from the party to whom it is to be paid. Ib.

4. Though an award should not in terms decide all the matters submiteed to the arbitrators, yet if the thing awarded necessarily includes the other things mentioned in the submission it is sufficient. Ib.

5. When an award does not fix the time of payment of the sum awarded, the money is payable immediately. Ib.

6. When, by a separate agreement, any submission is intended to be made a rule of court, an agreemnt to that effect in writing must be signed by the *parties*, and filed in the office of the clerk of the court of which said submission is to be made a rule. An agreement signed by one of the parties is not sufficient. O'Bryan v. Reed. 448.

7. When an award is made, the parties agree to open it, and refer the matter in difference between them back to the arbitrators, the agreement so to do will be a fatal objection to a motion asking that the award be made a rule of court, and that judgment be entered theron and execution issue. In such case, there is no award to be enforced. Ib.

8. Where the record shows admissions by the party seeking to enforce the award, that matters had been submitted to the arbitrators which were not adjudicated by them, and that others were adjudicated which they omitted to state in their award, the award, it would seem, should not be enforced, in the face of such acknowledgments. Ib.

9. If an agreement to open an award is signed by the attorney of one of

the parties, though he had no authority, yet, if the party for whom he assumed to act subsequently ratifies the act, it is valid. Ib.

ASSUMPSIT.—See Action, 2, 3.

ATTORNEY AT LAW.—1. The powers of an attorney at law do not extend to the execution of a bond for his client. Gordon & Wife vs. Camp, 23.

2. When, by the negligence or unskillfulness of an attorney, a judgment has been taken which stands in the way of a recovery, or is calculated to embarrass the plaintiff in a suit upon the original contract and such judgment thus improvidently taken is erroneous, the plaintiff will be allowed to reverse it. Hale et al. v. Crowell's administrators, 534.

CESTUI QUE TRUST—See Trustees and *cestui que trust.*

CONFESSION OF JUDGMENT.—An agreement by a defendant under his hand and seal to confess judgment is not a power of attorney to confess judgment, and is not within the prohibition of the statute. Shepard v. Kelly, 634.

CONSIDERATION, FAILURE OF—1. In an action upon a note given to secure the payment of the purchase money of lands, an equity existing in a third person is not sufficient to sustain a plea of failure of consideration. Long v. Allen, 403.

2. A mere equity in another person is no defence at law, in an action brought to recover the purchase money. There must be fraud or eviction, or something equivalent thereto, or admitted or unquestionable paramount title, Ib.

3. When the vendor of land has a patent from the United States, and the payment of the purchase money is resisted on the ground that there is an outstanding title in another person, evidenced by a receipt given to such other person by the Receiver of the Land Office, the defence is not such a one as can be set up in a court of law against the person holding and exhibiting the patent, and who is seeking to recover on a note given by the purchaser. Especially will a court not be inclined to admit such a defence, where it appears that, at the time of the purchase, the purchaser had knowledge of the existence of the claim so set up, Ib.

4. A bond or covenant constitutes a good and valuable consideration for a note given upon a sale of land: and a want of failure of title is no defence to an action on the note, Ib.

CONTRIBUTION.—1. Where, in a suit against one of two sureties, judgment is fairly obtained against him, and no collusion existed between him and the party recovering judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given to his co-surety, the latter stands virtually in privity with him against whom judgment has been obtained. The co-surety in such case is bound to avail himself of any defence he may have, and will not be permitted afterwards, in a suit for contribution brought against him

by his co-surety, who has paid and satisfied the judgment, to set up any defence which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defence to the action. Having failed to do so, though he had full notice of the pendency of the action, he waives all defence he might have had; and in a suit for contribution against him by the co-surety, the judgment is to be deemed *res adjudicata*. Love v. Gibson, 598.

2. The payment of a debt by the surety, on default of the principal, is not deemed a voluntary, but a compulsory payment, and the action for contribution may be maintained, though no demand has been made or action brought on the original liability, Ib.

CURRENT FLORIDA MONEY.—A note payable in "current Florida money," is payable in good funds. Williams v. Moseley, 304.

DEVASTAVIT.—See Legacy.

DOWER—Where real estate is, by order of the County Court converted into money, the heirs and distributees cannot claim that the one-third belonging to the widow of intestate for her natural life, be paid over to a master, to be by him laid out at interest. Her life interest in money in her hands is not subject to be disturbed except on showing of fear of loss or making away with it, and even then she should have the privilege of giving security for it. Osborne & wife v. Van Horn, et al., 360.

ERROR, WRIT OF.—1. A writ of error will be dismissed on motion made for that purpose, where the plaintiff in error was the original plaintiff, and had not, previous to suing out his writ of error, paid all costs incurred in the court below, and given bond, as required by statute. Union Bank of Florida v. McBride, 7.

2. There is no exception to this rule in favor of non-resident plaintiffs, Ib.

3. The Territorial act of February 12, 1836, entitled an act to amend an act regulating the mode of suing out writs of error and prosecuting appeals in the Territory of Florida," passed February 8, 1832, is not repugnant to the 5th section of the act of Congress, approved May 15, 1826, entitled an act to amend the several acts for the establishment of a Territorial Government in Florida." Gordon & wife v. Camp, 23.

4. The Act of February 12, 1836, is restraining and prohibitory. What was before a writ of right, is no longer so to original plaintiffs. They are not entitled to a writ of error unless they first pay all costs incurred in the Court below, and give bond as required by the statute, Ib.

5. Filing money in court, to be substituted for the personal security required in the plaintiff's bond under the act, will not meet the requirements of the act, Ib.

6. A cause in chancery cannot be brought to this court by writ of error. Bradford's executor v. Marvin & Martin, 101.

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7. It is a well settled principle, that a party may resort to a court of error to obtain a reversal of his own judgment, if it has been so rendered that he may sustain injury by it. Hale et al. v. Crowell's administratrix, 534.

8. The rule that a party shall not take advantage of an error for his benefit does not apply to errors of the court, as when it pronounces a wrong judgment. See appeal 2, Ib.

ESTATE TAIL.—A deed using the term "have loaned to A. during her natural life, and after her death had given unto the heirs of her body which survive her, to be equally divided amongst them;"

And a devise "I lend unto my daughter A., during her natural life, and after her decease to the heirs of her body, share and share about," were held, as well by the laws of South Carolina as the common law of England, to create an estate-tail in personal property, so as to vest it absolutely in A., and on her marriage in her husband. On her death the property belonged to his administrator, and not to her heirs. Watts, administrator, v. Clardy. 369.

ESTOPPEL.—1. The technicalities incident to estoppels are gradually giving way to considerations of reason and practical utility, and the courts at the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality. Camp v. Moseley et al., 171.

2. Where one was present when a levy is made by the officer, and did not deny the right of the officer to make such levy, but furnished a list of property to be levied on, attended the sale and took an active part assisting the officer, advised bystanders to bid, and disapproved the forbidding of the sale by another: Held—that, although it appeared that such conduct was not fraudulently or wilfully intended to deceive the officer, the party so conducting himself is *estopped* from afterwards alleging that the officer was a trespasser. Ib.

3. The acts and admissions of one of several administrators, which amount to an *estoppel* against him, bind the whole. Ib.

4. The effect of an *estoppel*, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court, and not of fact for the jury. Ib.

5. The doctrine of estoppel is *pais* laid down in Cotten v. Williams, and Camp v. Parkhill's administrators decided at this term approved. Ponder v. Moseley, et al., administrators. 207.

EVIDENCE—1. Where in such case the defendants gave in evidence two notes of the plaintiff's testator, given for negro hire, payable to defendants as executors of the estate for which the professional services were rendered, and there was a receipt endorsed on each of the notes, one of the receipts being in the handwriting of plaintiff's testator, the receipts created a presumption of payment on account of the professional services of the plaintiff's testator, rendered for the benefit of the

estate of which the defendants are the representatives. Broward & Eubanks v. Doggett, Ex. 49.

2. Where money, sought to be recovered under a count for money paid, has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the *fact* of the judgment and amount so recovered. For such purpose it cannot be considered as *res inter alios acta*. Love v. Gibson, 548.

3. Under the plea of *plene administravit*, an administrator cannot be allowed to offer in evidence a receipt for the payment of money by him which payment has been rejected and disallowed by the probate colurt. Before any right attaches to offer any evidence of expenditures made by the administrator under this plea, such expenditures must have been allowed by the court of probate. The action of that court in regard to counts of executors, &c., is conclusive, unless appealed from. Union Bank of Florida v. Parkhill's adm'rs., 660.
See Money Counts—Record 3, 4, 5, 6. Usury, 1.

EXECUTION—1. An execution sued out after a year and a day is not void, but voidable only. Moseley v. Doe ex. dem. Edwards, 429.

2. The right of the plaintiff to sue out execution after such time can be questioned only by the defendant; it cannot be impeached collaterally, Ib.

EXECUTION CREDITOR—1. A judgment in favor of one execution creditor of an estate upon a rule against another execution creditor of the estate, determining the right of the parties to moneys in the hands of the Sheriff is irregular, such mode of proceeding not being authorized by Common Law or Statute. Willis' Ex'r, v. Shepard, 397.

2. The proper course in such case is for each execution creditor to take his rule against the Sheriff, Ib.

FORECLOSURE—See Jurisdiction 7—Mortgage 2, 3—Practice 17, 18.

FRAUD—1. The mode or manner in which fraud is effected is not a matter of much consequence; it is effect produced to which the court must look, in order to see if the result is a consequence of the fraud complained of. Ferrall et al. v. Bradfords, 508.

2. Where fraud is *admitted* or proved, relief can be obtained in a court of law, as well as in a court of equity; and when the defence of fraud exits at law, the party *should* avail himself of it there, Ib.
See Pleading 10.

FRAUD, STATUTE OF—Where the mortgage of real estate covered by a mortgage conveys to a purchaser, and the purchaser to complete his title procures the mortgagee to release to the mortgagor, and promises in consideration of such release to pay a given sum to the mortgagee, Held—That such promise need not be in writing. Simonton v. Gandolfo, 392.

GRANT—1. Where a concession of land in 1817 by the Spanish authorities of West Florida, was made "subject to the conditions prescri-

bed in the regulation of 17th July, 1799" and the decree of concession concluded with an order "that the land be surveyed and marked by the surveyor to be submitted to the superior authority—costs to be taxed"—and no further steps appeared to have been taken to comply with the conditions or to complete the grant anterior to the cession of the Floridas by Spain to the United States held, that such concession is not evidence of title. Doe ex dem. Comyn's v. Latimer, 71.

2. A government or individual who makes a grant of land upon a condition precedent, may waive or dispense with a compliance therewith, so long as it, or he holds the reversion; but when it, or he conveys that reversionary interest, the right to do so ceases, Ib.

3. A grant of land, by the description of "the tract of land at the point of the "Flag Staff," and without any further designation, to give a place of beginning for a survey, is void, for being so uncertain that locality cannot be given to the land, Ib.

GUARDIAN AND WARD.—1. H. as principal, and W. & C. as sureties, executed notes payable to B., as guardian of the heirs of F., upon the purchase by H. of lands belonging to the wards. B., the guardian died, and H. was appointed his successor, who upon a settlement as guardian with the executor of B., his predecessor, received among other things the notes executed by himself, and gave receipts as guardian to the executor of B., as for so much money. H. afterwards, at the instance of C., one of his sureties, cut the names of W. & C. from the notes. In his accounts filed in the County Court, H. charged himself with a large sum, comprising nearly all the estate of his wards received from the executor of B., as received in "notes and accounts." H. died, and S., who was appointed his successor as guardian, instituted suit in the name of the executor of B. for his (S's) use as guardian, against W., one of the securities on the notes. Held, by a divided court: That the notes were not extinguished, and that S. was entitled to recover the amount of the notes. William v. Moseley, 304.

2. Where there was a contract to pay money to one as guardian, by a company of which he was at that time a member, this was not such an union of the character of debtor and creditor in the same person as to extinguish the debt—it merely suspended the remedy as to the guardian; though, in such case the infant's remedy is not suspended, but he may sue by his *prochein amie*. Lanier & West v. Chappel, 621.

HEIR—See "Action," 1.

HUSBAND AND WIFE—1. Where notes had been given by a husband for materials and merchandise, used and employed for the benefit of the separate estate of his wife, for her support and maintenance, and judgments had been recovered on the notes against the husband, and executions had been returned "no property found:" Held on bill

filed for that purpose by these judgment creditors, that the separate estate of the wife was liable in equity for the payment of these claims. Administrator of John Smith v. Poythress, 92.

2. Had the husband paid these demands, he would have been entitled to be re-imbursed out of the separate estate, and the creditors are entitled in equity to the same equity, the husband being insolvent, Ib.

3. A grant of administration in this State to the husband by virtue of his martial rights upon the estate of the wife, she being a non-resident at the time of her death, and dying in another State, but entitled to effects and property in this State, is valid under our laws. Blewitt, adm'r., v. Nicholson and Averitt, Ex'rs., 200.

INDICTMENT—1. An indictment ought to be certain to every intent —but the abbreviation or character & for "and," is not such an obscurity or ambiguity as will render the indictment bad. Holton v. The State, 476.

2. Where the record shows that the Grand Jury presented a bill of indictment—The State v. A. B. Felony, "a true bill"—it cannot be held to be the finding of a true bill for murder. And the fact that an indictment for murder is spread out in *extenso* on the record, does not cure the defect—for the record also shows that the grand jury did not find a true bill for murder, but only for felony, Ib.

3. Manslaughter is a felony, and where a bill of indictment for murder is found "a true bill," but endorsed "felony—a true bill"—*non constat*, but that the Grand Jury could not agree upon a finding for murder, and so found for felony, which might mean manslaughter, or any other felony, Ib.

INFANT.—1. It may be regarded as established by the English and American decisions, that a mother is entitled to an allowance for the maintenance of her children out of their fortunes, especially where her own fortune is inadequate. Osborne and Wife v. Van Horn et al., 360.

2. In general this allowance is to be confined to the annual income, and should not extend beyond it; but where the property is small and more than the annual income is necessary for the maintenance of the infants, the court will sometimes allow the capital to be broken in upon, Ib.

3. If there is a necessity for breaking in upon the capital of an infant for his maintenance, the proper course is first to apply to the courts for its sanction. If, however, this course is not adopted, disbursements beyond the income are at the peril of the guardian, and he is bound, before he makes an allowance for such disbursements, to show a state of facts demanding and justifying them, and should produce the vouchers, &c., of his expenditures, Ib.

4. The statute of limitations is no bar to items of such expenditures, disbursed more than five years anterior to the filing of a bill by the distributees for an account and distribution, Ib.

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INTEREST.—1. When partial payments are made, the rule, with respect to interest, is to apply the payments in the first place to the discharge of the interest due at the time of payment. If the payment exceeds the interests, the surplus must be applied to the discharge of the principal, and interest is then to be computed on the balance of the principal remaining due. Hart v. Dorman, 445.

2. When the payments are less than the interest, the surplus of interest unpaid is not to be considered as principal; but interest continues on the former principal, until the payments taken together exceed the interest due; and then the surplus of interest is to be applied to the reduction of principal, and interest again to be computed on the balance, Ib.

3. There is nothing in the statute of this State which makes this mode of calculating interest and applying partial payments improper—nor is there anything peculiar in that statute, or distinguishing it from the statutes of other States, where the rule is recognized, Ib.

JEOFAIL.—See Pleadings, 6. Practice, 4.

JOINT OBLIGOR.—1. A judgment without satisfaction, recovered against one of two or more joint debtors, is a bar to an action against the others. If parties enter into a joint obligation, it is certainly to be understood they are to be sued jointly and not severally. Ferrall et al. v. Bradfords, 598.

2. If, upon such an obligation, separate suits are brought against the joint obligors, the non-joinder of all the obligors who are in full life, and who have not been discharged by the operation of a bankrupt or insolvent law, and who are of full age, may be pleaded in abatement, Ib.
See Pleading, 9.

3. When, in a joint action upon a joint contract, a judgment is entered up against one defendant, after having discontinued as to the other who had been in court as co-defendant, it is erroneous and fatal. This principle applies with greater force when the judgment is first taken against one of several joint obligors, and the suit is afterwards dismissed as to the others. Hale et al. v. Crowell's administrators, 534.

JUDGMENT—1. To authorize the assertion that a judgment is void it must have emanated from a Court of limited jurisdiction not acting within its legitimate prerogative, or from a Court of general jurisdiction, where the parties are not actually or by legal construction, before the Court, and subject to its jurisdiction. Ponder v. Moseley, et al., adm'rs., 207.

2. Judgments of Courts of general jurisdiction are not considered under any circumstances as mere nullities, but as records importing absolute verity, and of binding efficacy until reversed by a competent appellate tribunal. They are voidable, not void. Ib.

3. The lien of a judgment is not lost by mere delay to sue out execution. Moseley v. Doe ex. dem., 429.

4. The lien of a judgment growing out of a matter of record, is constructive notice to all the world, Ib.

5. Real property levied on under a junior judgment and sold, is still subject to the lien of an older judgment; and the circumstance of not proceeding upon the older, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien, Ib.

INSTRUCTIONS—1. It is erroneous so to instruct or charge a jury, as to leave the whole case to the *opinion* of the jury, without reference to the testimony. If a charge is so framed, the jury may suppose that they are at liberty to find their verdict upon what they know of the case, irrespective of the evidence before them. Doggett v. Jordan, 541.

2. The question whether a partnership exists between parties, is a question of fact for the jury to determine, upon the evidence adduced under the instruction of the Court, if asked, as to what, in law, constitutes a partnership. It is error to tell the jury that a partnership exists, and that a defendant is liable in consequence of such partnership. Such a charge is erroneous, because it is both as to the law and the fact, and the Court is, therefore, not warranted in giving it, Ib.

3. The jury should be told by the Court that they are the sole judges of the facts, and that it is not only their right but their duty to find according to their own views of the proofs before them, regardless of any opinion the court may entertain in reference to such proofs, Ib.

4. A charge to the jury upon the facts of the case, is in violation of the express provisions of the act of the General Assembly of January 3, 1848, entitled, "An act to amend the several acts regulating judicial proceedings." Ib.

5. It is error not to reduce to writing the charge given by the court upon the law of the case. The act of January 3d, 1848, makes it the duty of the judge presiding, upon the trial of common law causes, to charge the jury *only* upon the law of the case, and points out the manner of such charge, and directs that it shall be wholly in writing, Ib.
See Practice 10, 11, 12, 15.

JURISDICTION—1. The second action of the act of July 25, 1845, which limits the jurisdiction of the Supreme Court to cases where the matter in controversy exceeds the amount or value of fifty dollars, is not in conflict with that provision of the Constitution of this State, which declares that the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant thereto, as may, from time to time, be prescribed by law. Curry v. Marvin, 411.

2. The word restriction means *"limitation, confinement within bounds."* and as used in the Constitution, applies to the amount and to the time within which an appeal may be taken, or a writ of error sued out. The word regulation more properly refers to the mode and form of proceeding Ib.

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3. Courts of Justice cannot act upon the presumption that powers conferred by the Constitution will be abused—or, because they may be, determine that they have not been given, Ib.

4. Where the sum in controversy is less than fifty dollars this court has no jurisdiction, Ib.

5. This court having appellate jurisdiction only, to be exercised in cases brought up by appeal or writ of error from the several Circuit Courts, the opinion of a judge, sitting in vacation, is not such a decision as an appeal lies from. Post and Wilson v. Carpenter et al., 441.

6. The Supreme Court of this State has no jurisdiction in a cause in Chancery, brought up by appeal from a decree, *pro forma*, entered in the court below by consent of parties. Durden and wife v. Lines et al., 569.

7. The act of December 11th, 1824, in relation to the foreclosure of mortgages by proceedings in the courts of law, requires *personal* service of notice of the intention of the party to institute his suit. If a party acknowledges service of notice, or appeals and pleads or confesses judgment, it is sufficient under this statute to give jurisdiction of the person of the defendant. Shepard v. Kelly, 634.

LEGACY.—1. A paper purporting to be the will of F., was admitted to probate by the County Court of Escambia, and L. appointed administrator with the will annexed. Under the provisions of the will, L. paid a legacy of $50,000 to the widow of the testator. Afterwards the next of kin F. applied by citation to the County Court for revocation of the probate of the will, and the application was refused, but upon appeal from the judgment of the County Court, the Superior Court revoked the probate and set aside the will. Held, that the payment by L. of the legacy did not constitute a *devastavit*, but on the contrary, was a duty enjoined by the obligation of his official oath, and that the next of kin could not recover the amount of the legacy against the adminstrator. LeBaron & Colquitt v. Fauntleroy et al., 276.

2. In such case where the widow and legatee afterwards married and died, her surviving husband is not liable to the next of kin for the amount of the legacy upon suit instituted after death, and simply upon the allegation that the administrator in paying the legacy committed a *devastavit*. Ib.

LIMITATIONS STATUTE OF.—See Infant, 4. Pleading, 15, Scrawl, 2.

MANUMISSION OF SLAVES—1. W. O. of South Carolina, devised the greater part of his real and personal estate to W. H., upon the condition that a certain slave and her four children, as his property and under his protection, shall be allowed all the privileges of free persons in the State of South Carolina, consistently with good order and a proper subordination, and shall be allowed out of the property devised to W. H., two hundred

and fifty dollars each, to be paid them at such times and in such quantities as, in his judgment, will be most proper; otherwise, they are to be taken to the State of Ohio, and the balance of the money, over and above what will be expended in their passage, to be paid to them there: and in case the said W. H. should refuse or neglect to comply with the conditions herein expressed, or should die without an heir, then, in either of these cases, all the interests, rights and emoluments left by the will of W. H., to go to J. H.

Held, first—That W. H. takes the estate devised to him, subject to certain conditions subsequent, which, unless he performed, a limitation over to J. H. is created, and is termed a conditional limitation.

Second—The testator, by such a will, manifests unequivocally his intention that the slaves shall be free, and this is shown by the declaration that they shall enjoy all the privileges of the free persons, &c., if they remain in the State—as well as by the wish expressed, that if they do not remain, they be taken to the State of Ohio.

Third.—A solemn trust is created by the terms of the will involving the freedom of slaves, and the greater part of the testator's estate is devised, subject to and conditioned upon this trust.

Fourth.—That portion of the will which provides that the slaves shall have the privileges of free persons is void, because it is a condition inconsistent with the gift, and incompatible with the relation of master and slave.

Fifth.—Such privileges would also be insonsistent with the laws and policy of South Carolina, where the will was made. This portion of the will could not, therefore, have been carried out.

Sixth.—The intention of the testator being to give the slaves their freedom, could have been carried out by taking them beyond the limits of the State—there being at the time of the probate of the will no law to prevent it in South Carolina.

Seventh.—The taking of the slaves to Ohio, was regarded by the testator as a dernier means of giving them freedom. No rational intendment other than that of freedom can be made or intended from the direction to move them to Ohio, and pay them money when there.

Eighth.—In the absence of any proof to the contrary, the presumption is, that the devisee executed and performed the trust reposed in him, the general rule being, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be inferred that he has duly performed it, unless the contrary be shown.

Ninth.—The will not having pointed out within what time the condition was to be formd the law presumes that it must be done within a reasonable time.

Tenth.—If not performed within a reasonable time, then the ulte-

rior legatee might claim the estate for condition broken—subject, however, in his hands, to the same condition. Sibley v. Maria, a free woman of color, 553.

2. The establishment of the right of the mother to freedom by the courts of Florida, does not infringe upon the policy of this State, owing to our statute in relation to the manumission of slaves, the presumption being that she was free when she came here, Ib.

MASTER AND SLAVE—In cases of injury to slaves, the American courts give a more enlarged protection than prevails in cases of *mere* chattels. They are moral and sentient beings, and the right of the master to maintain trespass for any battery of his slave is clear and well settled. McRaeny, Trustee, v. Johnson and Moore, 520.

MONEY COUNTS—1. The count for money had and received will be supported by evidence of the defendant's receipt of bank notes. Gordon and wife v. Camp, 422.

2. A count for money had and received, may be proved by any legal evidence, showing that the defendant has possession of the money of the plaintiff, which in equity and good conscience he ought to pay over, Ib.

MORTGAGE—1. The Territorial act entitled "An act to regulate the foreclosure of mortgages by the Courts of Common Law of this Territory and for other purposes," approved December 11, 1824, may afford a remedy in favor of the mortgagee, or his assignee, against the *mortgagor*, but not against the *assignee* of the mortgagor, because the statute gives judgment for the debt which cannot be rendered against the assignee of the mortgagor. Wilson, administrator, v. Hayward, 27.

2. The party claiming a judgment of foreclosure under the statute should be the owner of all the demands secured by the mortgage, otherwise he is not entitled to judgment, Ib.

3. Where several notes in the hands of different parties were secured by mortgage, and the holders of a part of the notes had by petition under the statute, obtained judgment of foreclosure against the administrator of the mortgagor, whereby he and all persons claiming through his intestate were barred of all right and equity of redemption in the mortgaged premises, and a sale of the premises had been made under the judgment—the holder of any of the remaining notes, secured by the same mortgage, cannot afterwards have a foreclosure under the statute of the same mortgage against the same defendant, Ib.

OFFICER—1. The officer will be protected in the execution of process emanating from a court of general jurisdiction, provided it appears on the face of the process that the court has jurisdiction of the *subject-matter*. The officer in such case need not show that there is a judgment, but may justify under the *writ* alone. Camp v. Moseley, et al. 171.

2. Where the *subject-matter* of the suit is within the jurisdiction of the court, but the want of jurisdiction is as to the person or place, unless the want of jurisdiction appear on the process to the officer who exe-

cutes it, he is not a trespasser—contrary, when the *subject-matter* is not within the jurisdiction of the court. Ib.

OYER.—See Pleading, 8.

PARTNERSHIP—1. Where a note is given in the name of a firm by one of the partners for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted and consent to the transaction. Lanier & West v. McCabe, 32.

2. In such case it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm, Ib.

3. Where several persons from an association, for the purpose of establishing and putting in operation a steam saw mill, one of the parties cannot issue notes in the name of the company, which shall bind the other members of the company, except the authority be given by their articles of association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual, otherwise a copartner will not be liable for the act of his partner, unless he gave express authority. Ib.

4. Where a note is made by one stockholder of such association as treasurer or agent of the company, payable to another stockholder, and the latter endorses it over to his creditors in payment of an individual debt, it is in effect the making of a note by two of the members of the company, but does not vary the rule which requires that a note so given should, to bind the other members, be given with the express authority of the other members. And where the plaintiff relies upon a subsequent acknowledgment of liability by defendant, such acknowledgment must be explicit and express. Ib.

PAYMENT.—1 The presumption is, that a debtor will pay his debt thro' an indebtedness of his creditor in preference to making a payment in cash. Broward and Eubanks, v. Doggett, Ex'x., 49.

2. No man can, by the voluntary payment of the debt of another, make himself that man's creditor and recover from him the amount of the debt so paid. Williams & Craig v. McGehee, adm'r., 58.

PLEADING.—Where the plaintiff in an action of assumpsit, filed a replication to one of several pleas of defendant and, afterwards, by leave filed an amended replication, to which the defendant demurred, and the Court sustained the demurrer; and where, on motion of the *plaintiff*, the judgment on the demurrer was set aside, and the plaintiff permitted to have a trial of the issue made by the *original* replication, as well as of the other issues in the cause—Held: 1 That the plaintiff cannot now be heard to complain that the demurrer to said amended replication remains undisposed of, or to insist upon any matter in relation to it as error, the judgment upon it having been set aside at his instance to enable him to submit the matters of fact in his case to a jury and he having pleaded over for that purpose. Mitchell v. Chaires Ex'r.

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2. If he intended to rely upon this objection, he should have permitted the judgment to stand, and assigned it as error, 18.

3. Under the plea of *"non cepit"* in replevin, evidence or damage on the part of the defendant is not admissible in any case. Hopkins & Moody v. Burney, 42.

4. This plea admits the property of the thing taken to be in the plaintiff, and if the defendant means to dispute the question of property he must plead specially, Ib.

5. The property being by this plea admitted to belong to the palntiff, it results as a matter of course, in the absence of all proof to the contrary, that the taking and carrying away of the property was wrongful, Ib.

6. In an action of *assumpsit*, where no damages are stated in the declaration, the defect is cured by verdict and judgment especially when sufficient damages are stated in the writ. Broward & Eubanks v. Doggett's executors, 49.

7. Where plaintiff's demurrer to defendant's plea was overruled and the judgment was *respondeat ouster*, and the plaintiff afterwards filed a replication to the plea, the demurrer is waived thereby, and the plaintiff cannot assign for error that the court erred in overruling the demurrer. Mitchell v. Cotten's executors, 138.

8. The regular mode of bringing the cause of action before the court, is by craving oyer. Comerford v. Cobb, 418.

9. Where a suit has been brought against several joint obligors, and the attorney of the plaintiff is induced, by the false and fraudulent representations of one of the defendants to dismiss the suit as to him and another, and take his judgment against the third joint obligor, the party making such representations cannot be permitted, in a subsequent suit on the same joint obligation to avail himself of the plea of a former recovery. Nor will the fact that such representations were made by one only of the defendants make any difference —the fraud enuring to the benefit of his co-defendant, against whom also, as well as himself the first suit was dismissed. Ferrall et al. v. Bradfords, 508.

10. A demurrer of defendants to plaintiff's replication averring that the proceedings in the original suit were dismissed as to them, owing to certain false and fraudulent representations made by one of them to plaintiff's attorney whereby he was imposed upon circumvented, and his judgment not fairly exercised admits the fraud so set forth in the replication, Ib.

11. A plea that is founded upon the idea that the cause of action arose in a particular county, from the fact that probate of the will was made and defendant undertook and assumed the duties and responsibilities of the office of executor in such county, only goes to the right of action. McDougal, administrator, v. Lea, executor, 532.

12. The statute which requires a party to be sued in the county of his

residence, or in that where the cause of action accrued, relates to the cause of action, and not to the right to sue, Ib.

13. When the plaintiff's replication alleges that the cause of action accrued in the county where the suit is brought, and the defendant demurs, the demurrer admits that the cause of action did not accrue in such county and consequently that suit is properly brought in that county, Ib.

14. An infant by her *prochein amie*, brought an action of *indebitatus assumpsit* for the work and labor of slaves. A note had been given to her guardian for the hire of slaves and the contract as to the time of the hire and labor was closed and executed—held, notwithstanding the written contract, this form of action would lie. Lanier & West v. Chappell, 621.

15. Replication of infancy to a plea of the statute of limitations is good; and a rejoinder thereto that the infant had a guardian at the time the action accrued and long after, was held to be bad on demurrer, Ib.

PLENE ADMINISTRAVIT.—See evidence, 3.

PRACTICE.—1. And although error should appear upon the record, yet if, in distinct pleadings, a complete bar is known to the action, the judgment for defendant must be affirmed. Mitchell v. Chaires, Ex'r:, 18.

2. Where there are several issues, requiring proof on the part of the plaintiff to sustain them and a verdict upon them was rendered for defendant, and there is no bill of exceptions to show on what grounds it was rendered, the court will presume the verdict to be right, and will sustain the judgment entered upon it, Ib.

3. The defendant cannot have a judgment of *retorno habendo* on a verdict in his favor upon an issue joined on a plea of *non cepit*. Hopkins & Moody v. Burney 42.

4. Where the jury were sworn to try the *issue joined* and there was in fact no issue, and judgment upon the verdict was entered, the statute of jeofail does not cure the error and the judgment must be reversed Ib.

5. Where, in an action by the executrix to recover for professional services rendered by her testator as general attorney of an estate of which defendants were the representatives after the testimony of several witnesses had been received, going to establish that plaintiff's testator had for several years acted at the instance of defendants as attorney of the estate and placing estimates upon these services—it was testified by a witness for defendants, that the plaintiff had admitted that her testator was employed to collect money due to the estate represented by defendants on a considerable number of notes which were placed in his hands and that one of the defendants agreed to give him ten per cent. on all moneys collected. Held: that it should have been left to the jury to determine whether such agreement did not embrace all the notes which plaintiff's testator had in his possession belonging to the estate, whether collected through means of suit or otherwise. Broward and Eubanks v. Doggett, Ex'x., 49.

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6. Where judgment has been rendered under the peculiar provisions of the second section of an act of the General Assembly, approved January 4, 1847, entitled "An act giving a lien to steamboat men and others navigating the Bay and River of Apalachicola," upon the affidavit of the plaintiff, without notice to the defendants or appearance by them, and without any declaration filed or assessment of damages by a jury: Held: That such judgment must be reversed, notwithstanding the statute does not expressly require either a summons, appearance by, or notice to defendant, or a declaration or a jury trial. Flint River Steamboat Company v. Roberts, Allen & Co. 102.

7. Where this court is equally divided in opinion, judgment must be entered affirming the judgment of the court below. Fraser and wife v. Willey. 116.

8. Where there is such division the jutsices are not required to file their opinion in writing before the judgment is pronounced, Ib.

9. A court of law, though the proper tribunal to try the title to land, will not try such title collaterally. Long v. Allen, 403.

10. A copy of the charge of the court to the jury admitting it to be a full and true copy, cannot rightfully be sent to the jury in a criminal case after their retirement. The charge of the court is part and parcel of the trial of the cause, the whole of which the Constitution requires to be public. Holton v the State, 476.

11. The sending the charge of the judge to the jury after their retirement, is tantamount to re-charging the jury at their room in the absence of the prisoner and his counsel—and to which if done in their presence, they would have had the right of excepting, or of moving additional instructions, and excepting to a refusal to grant them Ib.

12. If a charge in such a case can be sent at all, it should be the original, and not a copy, Ib.

13. During the whole of the trial of a capital case, the prisoner has a right to be, and must be, present. This is a settled and well established principle of criminal law; and this principle is violated by sending the charge of the court to the jury, if such a step is taken in the absence of the prisoner, Ib.

14. The prisoner in a capital case must be personally present during the whole of the trial and at every step taken in the cause. He has the right to discuss questions both of law and fact—and if, in any stage of the trial, any proceeding is had by which he has been deprived of such right it is the denial of a right which the constitution guarantees to him. At every stage of the proceedings, he must have an opportunity of coming into court and being heard. If any other course is pursued, and he is convicted, it cannot be said to be "by due course of law," Ib.

15. Even in a civil case no communication whatever ought to take place between the judge and the jury, after the cause had been committed to

them and they have been charged by the court, unless in open court, in presence, if practicable, of the counsel in the cause. This principle applies with greater force in a criminal, and especially in a capital case, Ib.

16. If in a capital case, the prisoner must be present at every stage of the trial, for the purpose of discussing questions both of *law* and fact, *quaere*, must he not also be present in the Supreme Court where matters of law touching his case, are brought up to be discussed settled and adjudicated? Ib.

17. A decree or judgment of foreclosure need not contain any more specific description of the property than a reference to the deeds of mortgage filed with the petition, which specifically set forth the property mortgaged. Shepard v. Kelly 634.

18. A judgment or decree of foreclosure under the statute, should not award execution against the specific property mortgaged. The law requires that execution shall issue thereon as in other cases, Ib.

PRINCIPAL AND AGENT.—See Witness, 3.

PRINCIPAL AND SURETY.—See Usury 1—Vendor and Vendee, 4, 5.

RECORD.—1. The affidavit made before a justice of the peace charging the commission of a criminal offence, the writ issued by the justice, and the *mittimus* directed to the sheriff, form no part of the record in a criminal case, and ought not to be inserted in it. Holton v. The State, 476.

2. A court at which an indictment is found, must be held at the time prescribed by law, and by the proper judge; and the record must show that a Grand Jury was impanneled and sworn, and it must set forth their names, and the time and place, when and where the indictment was found—and if an adjourned term, when the original term commenced Ib.

3. The act of 1843, T. Dig., 340, does not authorize the admission in evidence of such records or judicial proceedings from other States as are plainly irregular or defective or void, but only such as are valid between the parties. Porter v. Bevill, 528.

4. If it appears from the record of the judicial proceedings of a court in another State, that a judgment was rendered against a party not legally summoned, the judgment will be considered here as void, just as such judgment would be regarded if rendered in this State against a person not legally summoned Ib.

5. Where the courts of this State are required to sanction and enforce the proceedings of the courts of other States, the regularity of such proceedings can and ought to be inquired into, Ib.

6. Where the rule of court in a sister State, made in pursuance of authority given by law, requires in any given case personal service of notice of any proceeding, or publication in a gazette or newspaper, and no such notice or publication appears in the record of the proceed-

ings offered in evidence in the courts of this State such proceedings, so far as concerns the party here, against whom they are attempted to be enforced, will be regarded as *coram non judice*, and not binding upon him, Ib.

REPLEVIN.—The common law did not give damages in replevin to a defendant, and the Stat. 7, Hen. 8, ch. 4, and 21 Hen. 8, ch. 19, only gave damages to avowants, or other persons making connusance or justifying as baliffs in replevin for rent or services, and have not been extended to defendants claiming property. Hopkins & Moody v. Burney, 42.

RETORNO HABENDO.—See Practice, 3.

SALES UNDER EXECUTION.—1, The title of a purchaser at a sale under execution, issued from a court of general jurisdiction, is not affected by a subsequent reversal of the judgment on which the execution was based. Ponder v. Moseley, et al., administrators, 207.

2. B., a creditor sued M. and M., administrators of the debtor. The defendants pleaded in bar. Afterwards the letters of M. and M. were revoked; and subsequently M. and M. and another were appointed administrators *de bonis non*. M. and M. pleaded their dismissal in bar *puis darrien* continuance. The plaintiff replied the reappointment of M. and M. The defendants rejoined, that although reappointed with another as administrators *de bonis non*, a judgment had been recovered against them in their new character sufficiently to cover the assets in their hands. The plaintiff then demurred, and judgment was rendered in favor of the plaintiff, against M. and M. as administrators. Execution was issued, to be levied of the goods of P. the intestate, in the hands of M. and M. as administrators. Under this execution, the officer levied on the property of P. the intestate, in the hands of the administrator *de bonis non* and a sale was made. After the sale, M. and M. sued out a writ of error from the Supreme Court and the judgment was reversed. Held that the purchaser at this sale acquired a good title, Ib.

SCIRE FACIAS.—1. A *scire facias* to revive a judgment is not an original but a judicial writ founded on some matter of record to enforce execution of it and properly speaking it is only the continuation of an action. Brown v. Harley 159.

2. In *scire facias* upon judgment, a declaration is not necessary, Ib.

SCRAWL.—1. The word *seal* written in the *scrawl* attached to the name of the obligor, indicates the intention of the party executing the instrument to make it a specialty, and the intention must govern. Comerford v. Cobb, 418.

2. The word seal so written in the scrawl makes the instrument a writing obligatory or specialty, to which the plea of statute of limitation is bad, Ib.

SEAL.—See scrawl.

STATUTES.—1. Where consequences in violation of common reason, com-

mon right and the principles of common justice arise even collaterally out of a statute, it is void *pro tanto*. Flint River Steamboat Company v. Roberts Allen & Co., 102.

2. The statute above referred to is in violation of the declaration of our Constitution, "That the right of trial by jury shall forever remain inviolate," and is null and void, Ib.

3. The statute providing that the justices shall file their opinions "in all cases decided in said (this) court before judgment pronounced," is only *directory*. Fraser and wife v. Willey, 116.

4. Whenever a power is given by a statute every thing is necessary to the effectual execution of the power is given by implication. Mitchell v. Maxwell 594.

TRUSTEE AND CESTUI QUE TRUST.—1. The trustee of a married woman is the proper person to bring an action at law for asserting or defending the legal title, and every action founded on such title must be brought in his name. McRaney, Trustee, v. Johnson and Moore, 520.

2. The fact that the property, for an injury to which the action is brought, was in the actual possession of the *feme* at the time of the jury, does not change or affect the right of the trustee to sue, Ib.

3. When the deed of trust allows the property to remain possession of a married woman, her possession is consistent with the deed, and she is to be regarded as the agent of the trustee Ib.

4. The right of action, in such case, cannot be in the husband and wife, the *cestui que trust*—he having neither the ownership nor possession, Ib.

5. Wherever the trust would be supported in equity, the right of the trustee will be supported by law, Ib.

6. The trustee is the owner and has all the remedies devised by law for any injury done to the property in his charge, Ib.

UNION BANK.—1. The bonds made by the late Territory, payable to the Union Bank of Florida, are, under the charter of that institution, the property of the bank and the funds arising from the sale of them, the funds of the bank. Union Bank of Florida v. Parkhill's administrators, 660.

2. Shares in the Union Bank are the mortgaged securities given for stock, and a pledge or shares is a pledge of those mortgage securities. Ib.

3. The mortgage given by the stockholder to the bank was executed for the purpose—1. As provided by the 8th section of the charter, of securing payment by the bank, of the principal and interest of the bonds. 2d. Of securing payment by the stockholder to the bank, of his stock note or obligation and interest, if he fails to renew the note and pay interest as provided in the 29th section, Ib.

4. When a stockholder of the Union Bank fails to renew his note, and pay up the interest, if the bank shall file for cancellation with any officer of

the government whose duty it may be to receive them for cancellation, or with the Clerk of the Court in which the suit is pending, as many Territorial bonds as were issued on the faith and value of the mortgage securities of such defaulting stockholder, the bank, upon judgment rendered and execution issued may of right levy upon and sell the mortgaged premises of such defaulting stockholder, to be applied to the extinguishment of the judgment rendered on his stock note debt, together with interest due and costs accrued, Ib.

5. A stockholder has a right to continuance of the credit or loan which the charter gives him *only* upon his renewing his note and paying up the interest annually—and the taking of interest in advance is not violation of the charter, Ib.

USURY.—1. In an action by the payee against a security on the note, the principal may be examined as a witness for defendant to prove that the note was given upon usurious considerations. Mitchell vs. Cotten, Ex'r, 138.

2. Where a note tainted with usury has been given up and cancelled on being made the consideration of a usurious contract or note, and the usury in the latter has been established, the note cancelled may be recovered upon, as well against a surety as the principal, under the common counts, Ib.

VENDOR AND VENDEE.—1. The right of the vendor to an equitable lien upon the lands sold, is a right that exists, but may be waived, if the vendor takes a collateral security, binding others as well as the vendee. Bradford, adm'r v. Marvin & Martin, 463.

2. The taking of separate or independent security, if it is not *per se* a waiver of the vendor's lien, is at least *prima facie* evidence of such waiver; and the *onus* is upon the vendor, to show that it ought not to have that effect, Ib.

3. Where the vendor simply takes the note or bond of the vendee, and makes a conveyance he retains a specific lien upon the land, subject however, to be defeated by the intervention of creditors or purchasers without notice, Ib.

4. Where the vendor has parted with the title the surety has no right to claim to be substituted to the rights of the creditor, unless he has paid the money—and even then, he has no greater rights than the creditor himself had, Ib.

5. The surety may compel a sale of the lands to save himself harmless, where the title has been retained by the vendor, Ib.

WITNESS.—1. The tendency of the present age is to allow objections to be taken rather to the creditor than to the competency of a witness, and competency is always presumed until the contrary is established. Williams & Craig v. McGehee, adm'r, 58.

2. Where a witness had verbally assumed the payment of the expenses of a suit for the benefit of the plaintiff, so as to create a mere honorary or

moral obligation on his part to comply, he is not rendered incompetent to testify as a witness for the plaintiff, Ib.

2. Where money has been overpaid by an agent, or paid by mistake, he is a competent witness for his principal in an action to recover it back, Ib.

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